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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1981

STATE OF ALABAMA AND
ROBERT G. BRITTON, COMMISSIONER

Petitioners,

V.

DANNY RAY MYLAR, A/K/A
DANNY RAY MILES,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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AND

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ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED

1. IS THE RIGHT TO COUNSEL ON APPEAL A DUE PROCESS OR AN EQUAL PROTECTION RIGHT?

2. WHERE:

(A) UNIFORMLY APPLICABLE STATE RULES OF APPELLATE PROCEDURE REQUIRE NO BRIEF IN A CRIMINAL APPEAL.

(B) BUT, REQUIRE THE APPELLATE COURT TO SEARCH THE RECORD FOR ERROR IN ALL CASES,

(C) UNDER SUCH RULES A CRIMINAL APPELLANT'S LAWYER AS A MATTER OF STRATEGY FILES NO BRIEF ON ORIGINAL SUBMISSION BUT DOES APPLY FOR REHEARING WITH A SUPPORTIVE BRIEF AND DOES APPLY FOR DISCRETIONARY REVIEW BY THE STATE SUPREME COURT WITH A SUPPORTIVE BRIEF.

IS THE CRIMINAL APPELLANT DEPRIVED OF HIS U.S. CONSTITUTIONAL RIGHT TO COUNSEL ON APPEAL?

3. IS THE INEFFECTIVE ASSISTANCE OF COUNSEL AS TO SPECIFIC ACTS OR OMISSIONS GROUNDS FOR HABEAS CORPUS RELIEF UNDER 28 U.S.C. 2254 WHERE THE ALLEGED SPECIFIC IMPROPER ACTS OR OMISSIONS OF DEFENSE COUNSEL HAD NO PREJUDICIAL EFFECT ON THE CASE?

PARTIES

In the United States District Court for the Northern District of Alabama and the United States Court of Appeals for the Eleventh Circuit the parties were Danny Ray Mylar, alias, Miles, Respondent herein, and Robert G. Britton, Commissoner, and The State of Alabama, Petitioners herein.

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OPINIONS BELOW

The judgment and opinion of the United States District Court is not published but is submitted as Appendix "A" hereto.

The orders and opinion of the United States Court of Appeals are submitted as Appendix "B" hereto and are reported as: Mylar v. Alabama (11th Cir., 1982) 671 F.2d 1299.

JURISDICTION

The order of the United States Court of Appeals reversing the District Court's order denying the writ was issued on April 1, 1982. Rehearing was denied on April 29, 1982, and this petition is filed within sixty days of that date.

The jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Court of Appeals decided this case under the Sixth Amendment to the Constitution of the United States, in particular that portion which reads:

> "In all criminal prosecutions, the accused shall enjoy the right. . .to have the Assistance of Counsel for his defense."

The Petitioners insist that the case ought to have been decided under the Fourteenth Amendment to the Constitution of the United States, in particular that portion which reads:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall. . .deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, Section 2254. The same being voluminous is submitted as Appendix "C" hereto.

Title 12, Section 12-22-240, Code of Alabama, 1975. The same reading:

> "§ 12-22-240. Consideration of cases by court of criminal appeals generally.
>
> "In all cases appealable to the court of criminal appeals, the court must consider all questions apparent on the record or reserved in the circuit court and must enter such judgments as the law demands."

STATEMENT OF THE CASE

The following statement is based entirely on the opinions and orders of the four courts which heretofore have examined these matters and which are contained the Appendix to this petition.

Following his conviction in State Court for murder in the first degree, the Respondent Danny Ray Mylar also known as

"Miles" appealed to the Court of Criminal Appeals of Alabama. Under applicable Alabama statutes, rules and judicial constructions, criminal appellants' lawyers, whether appointed or retained, were not required to file briefs on original submission, but the Court was required to search the record for error in all cases, without regard to briefs or the lack thereof. Mylar's attorney relying on these rules, filed no brief on original submission. (Miles v. State, [Cr. App. Ala., 1977] 343 So.2d 801,802, Appendix "D"; District Court's opinion, Appendix "A", pp. 5-10; Mylar v. Alabama [11th Cir., 1982] 671 F.2d 1299, 1300, Appendix "B", p. 91).

The Court of Criminal Appeals of Alabama affirmed Mylar's conviction with a five page opinion which discussed the following issues: (1) the introduction

of the transcript of the cross examined preliminary hearing testimony of one Yarber (Mylar's co-defendant) (343 So.2d 801, 802-804); the cooroboration of Yarber's evidence (343 So.2d 801, 804-802) and Mylar's liability as an accomplice (343 So.2d 801, 805-806) the Court concluded its opinion with the following:

> "We have carefully searched the record for errors injuriously affecting the substantial rights of appellant and have found none.
>
> "The judgment of conviction is affirmed."
>
> (343 So.2d 801, 806, Appendix "D")

(Miles v. State [Cr. App. Ala., 1977] 343 So.2d 801, Appendix "D")

Mylar's appointed attorney then applied for rehearing and for discretionary review by the Alabama Supreme Court, in each instance filing a brief. Rehearing and certiorari were denied. (Miles v. State [Cr. App. Ala., 1977] 343 So.2d

801, Ex parte Miles [S.Ct. Ala., 1977] 343 So.2d 806, Appendix "D", pp. 112 and 124; District Court's opinion, Appendix "A", pp. 6-8; Mylar v. Alabama [11th Cir., 1982] 671 F.2d 1299, 1300, Appendix "B", pp. 90-91).

Mylar then petitioned the U.S. District Court for the Northern District of Alabama for a writ of habeas corpus under 28 U.S.C. 2254, Mylar raised numerous claims in addition to the matters at issue here but these were decided against him in the Courts below and are not directly relevant here. On the matter at issue here the District Court denied the writ on the basis of the matters set out above and the following:

> ". . .It is very possible that counsel for petitioner, after examining the trial record, believed it was the best strategy to have the Alabama Court of Criminal Appeals search the record for error...." (Appendix "A", pp. 7).

(District Court's Judgment and opinion, Appendix "A")

On appeal, the United States' Court of Appeals for the Eleventh Circuit reversed and ordered that Mylar be granted a second out-of-time appeal because of his lawyer's failure to file a brief on original submission. Mylar v. Alabama ([11th Cir., 1982] 671 F.2d 1299 Appendix "B").

The Petitioners herein applied for rehearing, suggesting rehearing en banc. The matters at issue here had been raised and argued throughout the prior proceedings, but on rehearing the Petitioner expressly raised the points raised here. The application for rehearing was denied. (Mylar v. Alabama [11th Cir., 1982] 671 F.2d 1299, Appendix "B", pp. 101-102.)

STATEMENT OF THE FACTS

It would not be appropriate here to detail the facts of Mylar's abuse and

ultimate murder of two helpless citizens. These are available in Appendix "D" and also in the report of Mylar's co-defendant's case. Yarber v. State (Cr.App. Ala., 1977) 375 So.2d 1212. However, it should be mentioned that both Mylar and Yarber presented the same defense. They each claimed that the other was more guilty. On this point, the Alabama Court of Criminal Appeals wrote:

> "...It is noteworthy that appellant testified at his own trial and his testimony as to all the details, places, and circumstances leading up to and culminating in the robbery, kidnapping and killing of Mrs. Knabe and Mr. White, in the main, pig-tracked the testimony of Yarber with one exception: Appellant claimed that Yarber was the leading actor in the entire drama and it was Yarber who did all the things that Yarber accused appellant of doing...." (343 So.2d 801, 805-806, Appendix "D", p. 118).

> "...This was a cold-blooded murder without any mitigating or extenuating circumstances. Two helpless and defenseless victims were robbed, kidnapped and shot to death. It does not matter which of the two men actually pumped the bullets into the

bodies of Mrs. Knabe and Mr. White, they were both equally guilty of murder and must pay the penalty of the law..." (343 So.2d 801, 805-806, Appendix "D", p. 123)

SUMMARY OF THE ARGUMENT

I. The right to counsel on appeal is an equal protection right.

A. There is an apparant conflict in the decisions of this Honorable Court holding that the only constitutional requirement in State appeals of State convictions is equal protection (e.g. Griffin v. Illinois, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 [1956]; Estelle v. Dorrough, 420 U.S. 534, 43 L.Ed.2d 377, 95 S.Ct. 1173 [1974] and Wainwright v. Torna, ___ U.S. ___, ___ L.Ed.2d ____, ____S.Ct. ___, 50 U.S.L.Wk. 3759 [1982]) and those which hold, or at least imply, that there are constitutional requirements beyond equal protection. Anders v. California, 386 U.S. 738, 18 L.Ed2d 493, 87 S.Ct. 1396 (1967); Entsminger v. Iowa,

386 U.S. 784, 18 L.Ed.2d 501, 87 S.Ct. 1402 (1967). Conflicts result when the State Courts follow one line of apparant authority and the Federal Courts follow the other. This Honorable Court should issue the writ to reconcile these cases.

B. If Anders v. California (above) and Entsminger v. Iowa (above) can be reconciled with the equal protection cases, it is by limiting them to their specific holdings, to wit, that the State must provide indigent criminal appellants with advocate attorneys rather than amicus curiae. The apparant conflict mentioned in "A", above, arises when these cases are treated as requiring a certain sort of advocacy. Since Mylar's lawyer was appointed as and acted as an advocate, the Court of Appeals decision is in conflict with Anders and Entsminger, above.

C. In numerous cases this

Honorable Court has held that in appeals the States need only guarantee equal protection. Since Mylar's appeal was treated exactly the same as any other, he has no equal protection claim. On this point, the Court of Appeals ruled contrary to the prior decisions of this Honorable Court.

II. This Honorable Court has held that habeas corpus is not available to review strategy decisions by a State prisoner's lawyer. Estelle v. Williams, 425 U.S. 501, 512, 48 L.Ed.2d 126, 135, 96 S.Ct. 1691 (1976). Since the failure of Mylar's attorney to file a brief was a matter of strategy, the Court of Appeals ruled contrary to this prior decision of this Honorable Court.

III. Numerous Circuits have held that where a claim of ineffective assistance of counsel is based on specific acts and omissions of counsel, the claimant

must show not only the ineffectiveness of the acts or omissions but also that the same adversly affected the case. As a matter of law, the failure of Mylar's attorney to file a brief had no effect on his appeal. Therefore, in ordering relief for Mylar, the Court of Appeals ruled contrary to the decisions of other Circuits.

ARGUMENT

I.

CONSTITUTIONAL RIGHTS IN APPEALS ARE EQUAL PROTECTION IN NATURE

A.

REASON FOR GRANTING THE WRIT: AN APPARENT CONFLICT AMONG THE DECISIONS OF THIS HONORABLE COURT

From 1894 onward, this Honorable Court has adhered to the principle that there is no constitutional right to appeal. McKane v. Durston, 153 U.S. 684, 38 L.Ed. 867, 14 S.Ct. 913 (1894). In

the 1950's, while expressly adhereing to McKane ,this Honorable Court held that, if a State provided appeal, it could not do so in a manner which discriminates against the poor. E.g. Griffin v. Illinois, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956); Brown v. Ohio, 360 U.S. 252, 3 L.Ed.2d 1209, 79 S.Ct. 1164 (1959); Lane v. Brown, 372 U.S. 477, 9 L.Ed.2d 892, 83 S.Ct. 768 (1963), and Draper v. Washington, 372 U.S. 487, 9 L.Ed.2d 899, 83 S.Ct. 774 (1963). Typical of the reasoning in these cases is that found in Griffin:

> "...It is true that a State is not required by the Federal Constituion to provide appellate courts or a right to appellate review at all. See, e.g., McKane v Durston, 153 US 684, 687, 688, 38 L ed 867-869, 14 S Ct 913. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty...." (351 US 12, 18, 100 L.Ed 891, 898).

Then on May 8, 1967, this Honorable Court vacated State appellate procedures in two cases in which there was no real suggestion of indigents receiving different treatment. Anders v. California, 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 (1967); Entsminger v. Iowa, 386 U.S. 748, 18 L.Ed.2d 501, 87 S.Ct. 1402 (1967). The basis of these decisions is seen in the Court's statement of the issue in Entsminger:

> "...This case, which was argued following Anders v California, 386 US 738, 18 L ed 2d 493, 87 S.Ct 1396, presents a similar problem in that we are here also concerned with the constitutional requirements which are binding on a State in the administration of its appellate criminal procedures with respect to convicted indigents seeking initial review of their convictions...." (386 U.S. 748, 749, 18 L.Ed.2d 501, 502) (Emphasis supplied).

These cases strongly suggested a departure from the equal protection approach. However, subsequent decisions by this

Honorable Court clearly show continued adherence to equal protection as the only requirement binding state appellate procedure. E.g. Ross v. Moffit, 417 U.S. 600, 41 L.Ed.2d 341, 94 S.Ct. 2437 (1974);[1] Estelle v. Dorrough, 420 U.S.

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[1] "...The Court of Appeals correctly recognized that there is no federal constitutional right to state appellate review of state criminal convictions. McKane v Durston, 153 US 684, 687, 38 L Ed 867, 14 S Ct 913 (1894); Griffin v Illinois, 351 US 12, 18, 100 L Ed 891, 76 S Ct 585, 55 ALR2d 1055.

* * *

"...That court recognized that appeals from state criminal convictions are not "explicitly or implicitly guaranteed by the Constitution," San Antonia Independent School District v Rodriguez, 411 US 1, 33-34, 36 L Ed 2d 16, 93 S Ct 1278 (1973), and that this Court in dealing with equal protection challenges to state regulation of the right of appeal in criminal cases had applied the traditional rational-basis test...." (420 U.S 534, 536-538, 43 L.Ed.2d 377, 380-381).

534, 43 L.Ed.2d 377, 95 S.Ct. 1173 (1974); Wainwright v. Torna, ___ U.S. __, ___L.Ed.2d ___, ___ S.Ct. ___, 50 U.S. L.WK. 3759 (1982).[2]

Although, as will be suggested in the next section, Anders and Entsminger can be reconciled to the equal protection line of cases, if they are limited to their holdings, there appears to be two lines of authority on the subject of constitutional requirements for appeals--Anders and Entsminger suggesting that there are certain minimum due process requirements, and all of the other cases holding that the only consitutional requirement is equal treatment.

The problem is that State Courts

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[2] Wainwright v. Torna was decided March 22, 1982, nine (9) days before the Court of Appeals decision in this case and was expressly called to the attention of the Court of Appeals on application for rehearing.

tend to follow the equal protection approach, while Federal Courts tend to follow the due process approach suggested by Anders and Entsminger.[3] The problem is compounded by the fact that, while State government can control most aspects of the appellate process so as to grant equal review, it can not, under the adversary system, control the conduct of appellants' lawyers.

The result of this is that the Federal Courts of appeal have, under Anders and

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[3] For example:

"...This court has long recognized that where a defendant has failed to obtain a fair appelate review of his conviction by reason of the denial to him of a constitutionally guaranteed right, means have been found to rectify the wrong by providing an appellate review of the conviction. Williams v. United States, supra, 402 F.2d at 552..." Robinson v. Wyrick [8th Cir., 1981] 635 F.2d 757, 759).

Compare the language quoted from Ross v. Moffit, above at page 15.

and Entsminger created a whole body of law on how a criminal appellant's lwyer must handle a state appeal of a state conviction. The lawyer must perfect and pursue the appeal, (Chapman v. United States [5th Cir., 1972] 469 F.2d 634, relied on by the Court of Appeals in the instant case.), obtain the the timely filing of the record. (Cantrell v. Alabama [5th Cir., 1977] 546 F. 2d 652, cert.den., 431 U.S. 959, 53 L.Ed.2d 278, 97 S.Ct. 2687), file a brief (Passmore v. Estelle [5th Cir., 1979] 607 F.2d 662, cert.den., 446 U.S. 937, 64 L.Ed.2d 789, 100 S.Ct. 2155) and the brief must argue alleged errors. (Robinson v. Wyrick [8th Cir., 1981] 635 F.2d 757). Also, since the Courts of Appeal see these principles as being due process in nature, they apply equally to indigents and non-indigents. Chapman v. United States, above, and Cantrell v.

Alabama, above.

While the Federal Courts follow this due process approach, the State Courts, or at least the Alabama Courts, follow the decisions of this Honorable Court mandating equal protection only. The State Courts consider that they are complying with the Constitution in applying their rules so as to guarantee equal appellate review in all cases. Thus, if an appellant's lawyer fails to file a brief and the Attorney General requests the Court to either require the filing of a brief or appoint other counsel, the request will be denied, because no brief is required, the Court reviews the record in all cases and, in any event, the appellant has received and will continue to receive equal appellate review, regardless of his lawyer's acts

or omissions.[4] Yet, when that same case gets before the Federal Courts on habeas corpus, an out-of-time appeal will be ordered because the lawyer filed no brief. The result of all this is that the State rules of appellate procedure are rendered meaningless, since any violation of them by an appellant's attorney simply produces an out-of-time appeal.

It is respectfully submitted that there is a great need for this Honorable Court to clarify the holdings in Anders and Entsminger so as to make them

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[4] This is based on the actual experience of the Alabama Attorney General's Office in many, many cases.

consistant with both prior and subsequent opinions.

B.

MYLAR'S LAWYER WAS AN ADVODATE, NOT AN AMICUS CURIAE

REASON FOR GRANTING THE WRIT: CONFLICT WITH PRIOR SUPREME COURT DECISIONS

The Court of Appeals decided this case under Anders v. California (386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 [1967]) and Entsminger v. Iowa (386 U.S. 748, 18 L.Ed.2d 501, 87 S.Ct. 1402 [1967]). In each of these cases appellants' lawyers determined that there was no merit to the appeal and proceeded to limit the Appellate Court's review of

their client's case. In Anders the lawyer filed a "no merit" letter, and in Entsminger the lawyer intentionally failed to have the transcript of the evidence filed in the Appellate Court. This Honorable Court struck down both cases because the lawyers had acted as amicus curiae rather than advocates. In the previous section it was argued that Anders and Entsminger are in apparent conflict with this Honorable Court's other decisions on the Constitution and appeal. However, if these cases are limited to their specific holdings, i.e., that the States must provide indigents with advocates rather than amicus curiae, they are easily and obviously reconcilable with the equal protection cases. The apparent conflict arises when these cases are read, not merely as requiring

that the lawyer be an advocate but as requiring that he advocate in a certain sort of way.

In every case a lawyer is in the paradoxical situation of serving two masters--the Court and his client. For his client the lawyer must advocate, which, as a practical matter, means try to win the case. But, on the other hand, the lawyer must not mislead the Court as to the law and the facts. Surely this Honorable Court in Anders did not intend to encourage the filing of frivolous briefs making spurious arguments in appeals.[5] If the lawyer in Anders saw no possible error in the record, he was not obligated to argue that which he did not believe, but he could have kept his opinions to himself. If California

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[5] It must be pointed out one of the results of the Anders rule has been the filing of such briefs in many cases.

required him to file a brief, he could have filed one setting out the adverse rulings and either explaining why they were not error[6] or generally arguing that they might be error. In either case, the attorney would have been acting as an advocate for his client with what he had.

To act as an advocate, as required by Anders and Entsminger, a lawyer must have freedom to decide how to handle the case. Litigation is an art not a science. The need for discretion in the attorney was recognized by this Honorable Court at the trial level in Estelle v.

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6 "...Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal...." (Anders v. California, 386 U.S. 738, 744, 18 L.Ed.2d 493, 498, 87 S.Ct. 1396 [1967]).

Williams (425 U.S. 501, 48 L.Ed.2d 126, 96 S.Ct. 1691 [1976]), wherein the Court wrote:

> "...Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system...." (425 U.S. 501, 512, 48 L.Ed.2d 126, 135).

In reading Anders and Entsminger as requiring that lawyers handle appeals in certain ways, the lower courts are re-writing "...the duties of...judges and counsel in..." appeals. The point of Anders and Entsminger is that in each of those cases, the lawyers' actions were dictated by determinations that the appeals were not meritorious. In Entsminger the lawyer decided not to cause the filing of the transcript of the evidence. Suppose, however, that the

lawyer's action was based on strategy considerations. Suppose Entsminger's lawyer saw a technical point in the indictment as the only hope for reversal and decided not to bring up the transcript of the evidence, because he (1) wanted to spotlight the indictment and (2) did not want the appellate Court distracted by the details of Entsminger's crime. Would the result have been the same? It is respectfully submitted that it would not.

If Anders and Entsminger stand only for the proposition that an indigent appellant must be provided with an advocate, then the Court of Appeals ruled in conflict with them, since Mylar's lawyer in this case was clearly an advocate. This lawyer was in no sense an amicus curiae. His not filing a brief on original submission was proper under the Alabama Rules. It in no way prejudiced

his client and was a strategic decision, as will be discussed more thoroughly below. His status as an advocate was underlined by his applying for rehearing and certiorari.

Since Mylar was provided with an advocate, as required by Anders and Entsminger, the decision of the U.S. Court of Appeals is contrary to this Honorable Court's decisions and opinions in those cases.

C.

MYLAR RECEIVED EQUAL PROTECTION OF THE LAW

REASON FOR GRANTING THE WRIT: CONFLICT WITH THE PRIOR DECISIONS OF THIS HONORABLE COURT AND ANOTHER COURT OF APPEAL

As discussed in Subsection "A", above, this Honorable Court has consistently held that appeal is a matter of State law, in which the only constitutional requirement is equal treatment.

E.g. McKane v. Durston, 153 U.S. 684, 38 L.Ed. 867, 14 S.Ct. 913 (1894); Griffin v. Illinois, 351 U.S. 12, 100 L.Ed.2d 891, 76 S.Ct. 585 (1956), Brown v. Ohio, 360 U.S. 252, 3 L.Ed.2d 1209, 79 S.Ct. 1164 (1959), Lane v. Brown, 372 U.S. 477, 9 L.Ed.2d 892, 83 S.Ct. 768 (1963), Draper v. Washington, 372 U.S. 487, 9 L.Ed.2d 899, 83 S.Ct. 774 (1963); Ross v. Moffit, 417 U.S. 600, 41 L.Ed.2d 341, 94 S.Ct. 2437 (1974); Estelle V. Dorrough, 420 U.S. 534, 43 L.Ed.2d 377, 95 S.Ct. 1173 (1974); Wainwright v. Torna, ___ U.S. ___, ___L.Ed.2d ___, ___S.Ct. ___, 50 L.WK. 3579 (1982). Now, if the only constitutional requirement binding on the States in appeals is equal treatment, then a claim of discrimination would be jurisdictional in a proceeding under 28

U.S.C. 2254(a)[7]. In other words, a claim by a State prisoner relating to a State court appeal could not state any violation of his rights, privileges or immunities under the Constitution, laws or treaties of the United States unless it alleged, at a minimum, different treatment. Now, Mylar's claim, which was accepted by the Court of Appeals, is simply that his lawyer filed no brief on original submission. Mylar does not and indeed can not claim that his appeal was treated differently either because of indigency or because his lawyer filed no brief. The fact is that Mylar was simply

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[7] "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the grounds that he is in custody in violation of the Constitution or laws or treaties of the United States." (28 U.S.C. 2254[a], Appendix "C").

not treated differently on appeal.

The only discrimination which could have been visited on Mylar because of indigency was the granting of a free record and attorney, but this would be necessary in order to bring an indigent up to the level of a non-indigent appellant. Thus, this discrimination produced equality rather than inequality.

Did the attorney's failure to file a brief on original submission limit the appellate court's review of Mylar's case? As the District Court found, Mylar's case was not the first Alabama appeal in which no brief was filed, indeed this has been common practice in Alabama for over a century. For example, in 1869 William Whitaker found himself indicted in Limestone County, Alabma, for assault. Whitaker attacked the indictment by a habeas corpus petition, which was denied. On appeal to the Alabama Supreme Court no

brief was filed for or by Whitaker. On that subject, the Alabama Supreme Court wrote:

> "By § 4314 [8] of the Revised Code, no assignment of errors is necessary in criminal cases, but this court must look to the whole record, and render such judgment on the record as the law demands." (Ex parte: Whitaker, 43 Ala. 323 [1869]).

Thus, for over a century before Mylar's case came before the Alabama Courts, appeals had been reviewed without regard to briefs or the lack thereof. The obvious purpose of these statutes and the decisions construing them was to guarantee that the quality of appellate

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8 "§ 4314. (763) Assignment of error, or joinder unnecessary.--In cases taken to the supreme court under the provisions of this chapter no assignment of errors, nor joinder in error, is necessary; but the court must render such judgment on the record as the law demands." (§ 4314 Code of Alabama, 1867).

See also Code of Alabama, 1852, § 3663 and Code of Alabama, 1843, Chapter XIII, § 7, page 470.

review did not depend on whether a party had a lawyer nor on the quality of his lawyer if he had one.

By the time of Mylar's appeal, the applicable statute read thusly:

> "§ 12-22-240. Consideration of cases by court of criminal appeals generally.
>
> "In all cases appealable to the court of criminal appeals, the court must consider all questions apparent on the record or reserved in the circuit court and must enter such judgment as the law demands..." (Title 12, Section 12-22-240, Code of Alabama, 1975).

This section and its statutory predecessors required the Appellate Court to search the record for error, whether a brief was filed or not. Hughes v. State, 213 Ala. 555, 105 So. 664, 665 (1925)[9];

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[9] "While we have treated only the questions discussed in brief of appellant's counsel, we have not been unmindful of the statutory requirement to search the record for error, which has been done and we fail to find where the trial court, has committed reversible error." (105 So. 664, 665)(Emphasis supplied).

Wesson v. State, 238 Ala. 399, 191 So. 249, 250 (1939)[10]; Harris v. State (Cr. App., 1979) 371 So.2d 979, 981,[11] cert. den., 371 So.2d 984. Because of this section, no criminal appellant need file on brief. Adams v. State, 280 Ala. 678, 198 So.2d 255 (1967); Johnson v. State, 257 Ala. 644, 60 So.2d 818 (1952); Bertalsen v. State, 20 Ala. App. 539, 103 So.

---

10 "It has been said that this statute, construed in pari materia with others embodied in said chapter, makes the right of appeal in criminal cases one of substance imposing on the court a duty to search the record for errors..." (191 So.2d 249, 250)(Emphasis supplied).

The case was reversed on grounds not argued in brief.

11 "...Although only the issue of the refused charges was expressly presented on this appeal, it is our statutory duty to search the record for any error which was duly preserved at trial. Section 12-22-240, Code of Ala. 1975. Therefore, four other points raised only at trial have been considered....(371 So.2d 979, 981).

The case was reversed on grounds not argued in brief.

480, (1925); Brown v. State (Cr. App. Ala., 1981) 396 So.2d 137, 138.[12] Thus, Mylar's case was in no way prejudiced by the fact that his attorney filed no brief. The Alabama Court of Criminal Appeals was required to search the record for error, and the Court's opinion stated and demonstrated that it did so.[13]

---

12 "By statute, this Court is charged with the duty of considering 'all questions apparent on the record or reserved in the circuit court." Alabama Code 1975, Section 12-22-240. This obligation exists even though the defendant has not filed a brief on appeal. Higginbotham v. State, 262 Ala. 236, 78 So.2d 637 (1955)...." (396 So.2d 137, 138).

NOTE: In each of these cases, Adams, Johnson, Bertalsen and Brown, no brief was filed by or on behalf of the Appellant, but the conviction was reversed.

13 Of course, there was no "search the record" requirement on rehearing or certiorari. Walden v. State, 240 Ala. 193, 198 So. 264, 265 (1940); DeGraaf v. State, 34 Ala. App. 137, 37 So.2d 130, 136 (1948). However, incident to these proceedings Mylar's attorney filed briefs.

Since Mylar has no claim that he was treated differently from any other Alabama Criminal Appellant, how can he claim a denial of equal protection? In a case similar in many respects to the instant case, the Tenth Circuit considered this same issue and reached the opposite conclusion from that reached by the Eleventh Circuit. In Hill v. Page ([10th Cir., 1971] 459 F.2d 679) a state prisoner sought Federal habeas corpus claiming that he had been denied effective assistance of counsel on appeal because his lawyer had filed no brief. The Tenth Circuit rejected this claim because the lawyer's failure to file a brief triggered a procedure by which the appellate court searched the record for

"fundamental error"[14] and, in any event, the attorney did apply for rehearing. If the Eleventh Circuit had followed the same rule, it could not have reached the conclusion it did.

Far more serious than the conflict with the Tenth Circuit are the patent conflicts between the Eleventh Circuit's decision in the instant case and those of this Honorable Court on the same subject. Since Mylar received equal, indeed the same, treatment that any other Alabama Criminal appellant received, he was not deprived of any right, privilege, or immunity under the Constitution nor any law or

---

[14] It must be observed that this procedure is much more limited than the Alabama procedure. In Alabama the "search the record" rule applies equally in briefed and unbriefed cases and the search is for all "...questions apparent on the record reserved in the..." trial court. Title 12, § 12-22-240, Code of Alabama, 1975.

treaty of the United States, and the Eleventh Circuit in holding that he was, ruled contrary to the numerous prior decisions of this Honorable Court holding that a state criminal appellant's constitutional rights on appeal are limited to equal protection.

II.

MYLAR'S ATTORNEY HAD THE DISCRETION NOT TO FILE A BRIEF ON ORIGINAL SUBMISSION AS A MATTER OF STRATEGY

REASON FOR GRANTING THE WRIT: CONFLICT WITH THE PRIOR DECISIONS OF THIS HONORABLE COURT

Why would a lawyer file no brief on original submission but apply for rehearing and certiorari? Incompetence? Laziness? Cowardice? Why? With regard

to competence, the Court of Criminal Appeals observed:

> "...Throughout the trial proceedings appellant was represented by the widely known law firm of Wilkinson, Purvis, Pickard & Parsons of Birmingham.[15] All of these lawyers are experienced in trial work and are noted for their resourcefulness, ingenuity and astuteness in protecting the constitutional rights of their clients..." (Miles v. State [Cr. App. Ala., 1977] 343 So. 2d 801, 802)

The trial record (Respondent's Exhibit "A" in these proceedings) reveals a highly competent and vigorous defense; the same competence and diligence was demon-

---

15 The same lawyers represented Mylar in the appeal.

strated on rehearing and certiorari.[16] These same documents, which compel the rejection of any suggestion of incompetence or laziness, also defeat any suggestion of cowardice. So, we are left with the original question--Why? There is but one answer: strategy.

The only possible error on appeal related to the introduction of the cross-examined preliminary hearing testimony of Yarber, Mylar's co-defendant. This testimony had been procured by a promise from certain police officers that they would not arrest him, if Yarber would testify against Mylar. The facts

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[16] Since, as discussed in the immediately preceding subsection, no brief is required on original submission, the Alabama Courts accept "briefs" in practically any form and accept them at any time up to the day the decision is actually issued. The same is not, of course, true of rehearing or certiorari. See DeGraff v. State, 34 Ala. App. 137, 37 So.2d 130, 136 (1948).

surrounding this deal had the appearance, at first glance, of possible impropriety--an appearance which could not survive any serious analysis.[17] If there was no error with regard to Yarber's testimony, it was difficult to see where there was error. If counsel filed a brief he would have had to analyize these points, and he would certainly have triggered an analysis by the Attorney General. On the other hand, the point was well preserved and would no doubt be noticed by the Court in its search of the record.[18] There was the possibility that the Court would act on first impressions and reverse. In addition, it was

---

[17] See Ohio v. Roberts, 448 U.S. 56, 65 L.Ed.2d 597, 100 S.Ct. 2531 (1980); California v. Green, 399 U.S. 149, 26 L.Ed.2d 489, 90 S.Ct. 1930 (1970).

[18] Which, of course, it was. Miles v. State (Cr. App. Ala., 1977) 343 So.2d 801, 804.

always possible that the Court of Appeals would notice something elsewhere in the record that counsel had overlooked. In any event, nothing was waived by the failure to file a brief, so this was a safe strategy.

This Honorable Court has recognized defense counsel's right and duty as an advocate to exercise discretion in strategy and has held that federal habeas corpus is not available to grant relief from strategy decisions by counsel. Estelle v. Williams, 425 U.S. 501, 512, 48 L.Ed.2d 126, 135, 96 S.Ct. 1691 (1976). The U.S. District Court based its denial of the writ in part on a finding that the attorney's failure to file a brief was based on strategy considerations. Strategy was argued in the U.S. Court of Appeals both in the State's brief and on rehearing. Yet, the Eleventh Circuit at no point in its opinion

mentions strategy. Obviously, the Court of Appeals decision is in conflict with Estelle v. Williams, above.

III.

WHERE A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS BASED ON SPECIFIC ACTS OR OMISSIONS OF COUNSEL, THE CLAIMANT MUST ESTABLISH THAT PREJUDICE RESULTED THEREFROM

REASON FOR GRANTING THE WRIT: CONFLICT AMONG THE CIRCUITS

In the previous sections it has been argued that counsel's failure to file a bried did not violate Mylar's constitutional rights and did not constitute ineffective assistance of counsel. In this section these points are conceded for the sake of argument.

The Fourteenth Amendment requires that Criminal convictions be obtained in accordance with due process of law. Due process of law requires that criminal defendants be attended by attorneys and, it is now almost universally held, that

attorneys must act in reasonably effective ways. The problem is that it is the State, the Public, which owes the duty of reasonably effective assistance and which will have to pay in money or social harm if it is not granted, but in fulfilling its duty the State must rely entirely on a defense attorney who it may not have selected, cannot control and who is charged with "...advancing the 'undivided interests of his client....'" Polk County v. Dodson, ____ U.S.____, 70 L. Ed.2d 509, 517, 102 S.Ct. ___, 50 U.S. L.WK. 4077, 4079 (1981). It is in this context that the prejudice requirement has developed in the Circuits.

The rule of many Circuits is that where a prisoner raises a claim of ineffective assistance of counsel based on specific acts or omissions of his attorney, he must show that the Attorney's acts and omissions (1)

amounted to ineffective assistance and (2) actually prejudiced the case. This was the conclusion reached by the Ninth Circuit, sitting en banc, in Cooper v. Fitzharris, ([9th Cir., 1978] 586 F.2d 1325, 1331ff, cert.den., 440 U.S. 974, 59 L.Ed.2d 793, 99 S.Ct. 1542. In reaching this conclusion, the Ninth Circuit relied on this Honorable Court's affirmance of Chambers v. Maroney, ([3rd Cir.,1969] 408 F.2d 1186, 1195, aff'd, 399 U.S. 42, 53ff, 26 L.Ed.2d 419, 429ff, 90 S.Ct. 1975 [1970]). See also United States v. Winston (9th Cir., 1980), 613 F.2d 221; Satchell v. Cardwell (9th Cir.,1980) 653 F.2d 408 United States States v. Swinehart (3rd Cir., 1980), 617 F.2d 336. In addition to the Third and the Ninth Circuits, the same rule applies in the District of Columbia Circuit (United States v. Decoster [D.C. Cir., 1979] 624 F.2d 196, 203ff, and

United States v. Wood [D.C. Cir., 1980] 628 F.2d 554), and the Fifth Circuit (Washington v. Watkins [5th Cir., 1981] 655 F.2d 1346, 1360ff). Compare Cuyler v. Sullivan, 446 U.S. 335, 64 L.Ed.2d 333, 100 S.Ct. 1708 (1980) and United States v. Morrison, 449 U.S. 361, 66 L.Ed.2d 564, 101 S.Ct. 665 (1981).

Under the Rule applicable in the Circuits referred to above, Mylar would not prevail unless he showed (1) that his attorney's failure to file a brief on original submission constituted ineffective assistance of counsel and (2) that the attorney's action prejudiced his appeal. For the sake of argument, it is conceded on this point that counsel's action rendered his assistance ineffective but was there any prejudice? In the context of this issue prejudice at a minimum would consist in Mylar's having available to him an issue on appeal which

might have resulted in a new trial but which was waived by his lawyer's failure to file a brief. As discussed at length at page 30 and following, the attorney's failure to file a brief waived no error in the record. Thus, as a matter of law the attorney's failure to file a brief could not have been prejudicial.

In deciding this case without reference to prejudice, the Eleventh Circuit ruled contrary to the rules prevailing in the District of Columbia, Third, Fifth and Ninth Circuits. For this reason the writ ought to issue.

CONCLUSION

In conclusion the Petitioners respectfully submit that this case presents an apparent conflict in the opinions of this Honorable Court in various cases, the decision of the Court

of Appeals conflicts with those of this Honorable Court and those of other circuits. For these reasons the Petitioners pray that this Honorable Court will issue the writ of certiorari and review the decision and opinion of the Honorable Court of Appeals and on such review will reverse the decision of said Court.

Respectfully submitted,

CHARLES A. GRADDICK
ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama and Commissioner Britton, Petitioners, do hereby certify that on this _____ day of June, 1982, I did serve the requisite number of copies of the foregoing on the Attorney for Danny Ray Mylar, Respondent, by mailing same to her, first class postage prepaid and addressed as follows:

Hon. Linda Friedman
Attorney at Law
1500 Brown-Marx Building
Birmingham, Alabama 35203

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:
Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

Office - Supreme Court, U.S.
FILED
JUN 7 1982
ALEXANDER L. STEVAS,
CLERK

81-2240

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1981

STATE OF ALABAMA and
ROBERT G. BRITTON,
COMMISSIONER,

Petitioners,

V.

DANNY RAY MYLAR a/k/a
DANNY RAY MILES,

Respondent

APPENDIX

TO THE PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL OF ALABAMA

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ATTORNEYS FOR PETITIONERS

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FILED APR 21 1981
United States District Court
Northern District of Alabama
James E. Vandegrift, Clerk
ENTERED APR 21 1981

DANNY RAY MYLAR, a/k/a DANNY RAY MILES,	:	
Petitioner,	:	
-vs-	:	
ROBERT G. BRITTON, Commissioner, Alabama and Board of Corrections and THE STATE OF ALABAMA,	:	NO. CV 79-A-1420-S
Respondents.	:	

JUDGMENT

In conformity with the Memorandum Opinion filed contemporaneously herewith, it is hereby ORDERED, ADJUDGED and DECREED that the petition for habeas corpus filed by Danny Ray Mylar pursuant

to 28 U.S.C. § 2254 be and the same hereby is DENIED.

DONE this 21st day of April, 1981.

/S/C.W.Allgood
SENIOR JUDGE

A TRUE COPY
JAMES E. VANDEGRIFT, Clerk
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
BY: /s/ Jane T. Deane
DEPUTY CLERK

* * * * *

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

DANNY RAY MYLAR, a/k/a DANNY RAY MILES,	:	FILED APR 21 L981 United States District Court
Petitioner,	:	Northern District of Alabama
-vs-	:	James E.Vandegrift Clerk
ROBERT G. BRITTON, Commissioner, Alabama Board of Corrections and	:	ENTERED APR 21 1981
THE STATE OF ALABAMA,	:	NO. CV 79-A-1420-S
Respondents.	:	

MEMORANDUM OF OPINION

This matter is before the court on a

petition for a writ of habeas corpus filed by a person in custody pursuant to a judgment of a court of the State of Alabama, 28 U.C 2254, and the recommendation of United States Magistrate Edwin L. Nelson.[1/] Danny Ray Mylar, hereinafter referred to as petitioner, was convicted in the Circuit Court of Jefferson County, Alabama, Bessemer Division on an indictment charging him with first degree murder and sentenced to life imprisonment.

This is the second habeas petition filed by petitioner. His first (CA 78-A-0071-S) was dismissed by the court for failure to exhaust state remedies. The present petition is essentially identical to the first petition with the addition

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1/A copy of the magistrate's Examination, Report and Recommendation for this case and the Examination, Report and Recommendation in CA 78-A-0071-S are attached hereto as Appendix A and B, respectively.

of a claim that his attorneys were constitutionally inadequate.

FACTS AND PROCEEDINGS

The two opinions of the magistrate accurately set out the facts concerning the crimes and issues before the court. The recitation of the facts and proceedings in the magistrate's opinions in both this case and CA 78-A-0071-S are adopted here.[2/]

CLAIMS

Petitioner asserts a number of claims as grounds for habeas relief. The magistrate's two previously mentioned Examination, Report and Recommendations contain an accurate analysis and discussion of these claims. The magistrate's recommendations for all the claims except the

---

2/No party has objected to the magistrate's recommendation. On its own the court has reviewed the record and declines to accept the recommendation as to one claim.

claim of ineffective assistance of counsel on appeal are hereby accepted and his holding and discussion on those issues is adopted here.

EFFECTIVENESS OF COUNSEL

The magistrate held that petitioner was denied effective assistance of counsel due to the failure of counsel to file an appellate brief. The court disagrees with that holding. Accordingly, that part of his recommendation is overruled.

It is undisputed that petitioner's court appointed counsel did not file a brief on the initial appeal. The conviction was affirmed on the record submitted. The Court of Appeals stated that it had "carefully searched the record for errors injuriously affecting the substantial rights of appellant and have found none." The question then arises whether petitioner was denied his right

to effective assistance of counsel. The standard utilized by the Fifth Circuit in determining whether counsel was ineffective is whether the petitioner was represented by "counsel reasonably likely to render and rendering reasonably effective assistance." Hill v. Wainwright, 617 F.2d 375 (5th Cir. 1980); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1979). Applying this standard to petitioner's case, petitioner was not denied effective assistance of counsel. Section 12-22-240 of the Code of Alabama 1975 requires the Alabama Court of Criminal Appeals to "consider all questions apparent on the record or reserved in the circuit court and must enter such judgment as the law demands." Due to this statute, appellants in criminal cases in Alabama are not required to file briefs. Watts v. State, 337 So.2d 91 (Ala.Cr.App. 1976); Youngblood v. City of

Birmingham, 338 So.2d 526 (Ala.Cr.App. 1976). Alabama appellate courts on many occasions have reversed criminal convictions on points not raised in brief or when no brief at all was filed. See Bertelsen v. State, 20 Ala.App. 539, 103 So. 480 (1925); French v. State, 28 Ala. App. 147, 180 So.2d 592 (1938); Johnson v. State, 257 Ala. 644, 60 So.2d 818 (1952); Cowart v. State, 44 Ala.App. 201, 205 So.2d 250 (1967). It is very possible that counsel for petitioner, after examining the trial record, believed it was the best strategy to have the Alabama Court of Criminal Appeals search the record for error. Furthermore, it should be noted that counsel for petitioner did file a brief seeking a rehearing before the Alabama Court of Criminal Appeals. When that rehearing was denied, the attorney petitioned the Alabama Supreme Court for a writ of certiorari. He filed

a brief along with the application for certiorari.

Effective Counsel is interpreted by the Fifth Circuit to mean not errorless counsel, and not counsel judged ineffective by hindsight. Herring v. Estelle, supra. The fact that petitioner's counsel chose to wait and file a brief only in application for rehearing may appear questionable in hindsight, but is not so negligent to be considered a violation of petitioner's constitutional rights. Although the Court of Appeals is not required to grant a rehearing when a brief is not filed on the original appeal or to consider issues subsequently raised, it may in its discretion do so. Watts v. State, supra. Counsel for petitioner allowed the Alabama Court of Criminal Appeals to search the record on direct appeal and then filed a brief seeking a rehearing when the conviction

was affirmed on direct appeal. It is very possible that counsel believed that this was the best way to obtain an extensive review of his client's case.

The State of Alabama has chosen to establish a system of review whereby the appellate court has a statutory duty to search the record for error. In accordance with that practice, counsel for appellants are not required to file briefs. Although this may not appear to be the best way to handle criminal appeals, it is not necessarily constitutionally invalid. Comity dictates that deference be given to the method the State of Alabama has chosen for considering criminal appeals. The Tenth Circuit has held on facts almost identical to these that the failure to file a brief was not ineffective assistance of counsel. See Hill v. Page, 454 F.2d 679 (10th Cir. 1971). Furthermore, it should

be noted that this system of appellate review applied equally to defendants with retained counsel and indigents with appointed counsel.

The magistrate, in his recommendation, relied on Passmore v. Estelle, 607 F.2d 662 (5th Cir. 1979). Although the facts are very similar, one important fact makes the cases distinguishable. The Texas appellate court was under no statutory duty to search the record as was the Alabama Court. An attorney in Alabama can reasonably rely upon that statutory duty to secure a meaningful review of his client's case. The Texas lawyer has no way of knowing whether the appellate court will examine the record and grant his client a meaningful review. The existence of this statutory duty is the critical difference in concluding that counsel's assistance in the case at bar was not ineffective.

In accord with the above and the magistrate's recommendation, this court must conclude that all of petitioner's claims are without merit. Accordingly, the petition for writ of habeas corpus relief is due to be DENIED. An appropriate judgment will enter.

DONE this 21st day of April 1981.

/s/ C.W.Allgood
CLARENCE W. ALLGOOD,
SENIOR JUDGE
UNITED STATES
MAGISTRATE

A TRUE COPY
JAMES E. VANDEGRIFT, Clerk
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
BY: /s/ Jane T. Deane
DEPUTY CLERK

* * * * *

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

DANNY RAY MYLAR, a/k/a DANNY RAY MILES, :

Petitioner, :

-vs- : NO. CV 79-A-1420-S

ROBERT G. BRITTON, Commissioner, Alabama Board of Corrections and THE STATE OF ALABAMA, :

Respondents.:

EXAMINATION, REPORT AND RECOMMENDATION

This is a petition for a writ of habeas corpus filed by a person in custody pursuant to a judgment of a court of the State of Alabama. 28 USC 2254(b). Danny Ray Mylar was convicted in the Circuit Court of Jefferson County, Alabama, Bessemer Division on an indictment charging first degree murder and was sentenced to life imprisonment. The Alabama Court of Criminal Appeals affirmed, 343 So.2d

801 (1977), and certiorari was denied in the Alabama Supreme Court, 343 So.2d 806 (1977).

This is the second petition by Mylar. His first (CA78-A-0071-S) was dismissed on recommendation of the magistrate for failure to exhaust state remedies. In that case the court considered transcripts of Mylar's trial, the record on appeal from the denial of his coram nobis petition, and a transcript of his preliminary hearing, making a record of more than 700 pages. Mylar also submitted numerous handwritten documents, some of which were poor quality photostatic copies, making a stack approximately three inches thick. Because a considerable amount of time and effort was involved in analyzing the entire record and because Mylar's failure to exhaust remedies as to one question did not become clear until after a great deal of

effort had been expended, the magistrate felt that it would be most efficient to write to those issues on which state remedies had been exhausted. Mylar now alleges that he has exhausted state remedies on the remaining issue. That is not contested by the respondents.

The present petition is essentially identical to the original and the magistrate's opinion in CA 78-A-0071-S with regard to most issues is adopted here.[1/] However, Mylar's claims with regard to the testimony of Samuel Yarber requires additional consideration and his claim that his attorneys were constitutionally inadequate must be considered for the first time.

THE RECORD

The entire record which is available

[1/] A copy of the Examination, Report and Recommendation dated April 18, 1979, is attached hereto as Appendix A.

to the court in CA 78-A-0071-S is likewise available now. Additionally, the petitioner has submitted a transcript of a hearing on a motion by Samuel Yarber to suppress prior statements and testimony at Mylar's preliminary hearing made by him. That record will also be considered here.

FACTS

The previous opinion of the magistrate set out the facts concerning the crimes of which Mylar and Yarber were convicted. This addition is necessary to the issues considered here.

Within days after the bodies of Mrs. Clarice Knabe and Ronald Harvell White were discovered, the petitioner Danny Ray Mylar and Samuel Yarber were separately taken into custody and questioned by officers of the Birmingham Police Department and the Jefferson County Sheriff's Department. The arresting

officers made a conscious decision that they would not advise Samuel Yarber of his right to remain silent and his right to counsel. Some went so far as to promise that he would not be prosecuted for any crime arising out of the incident in which Mrs. Knabe and Mr. White were robbed, kidnapped, Mrs. Knabe raped, and both murdered. Because of the failure of the officers to advise Yarber of his rights and the promises made to him, he gave a statement implicating Mylar which was consistent with the facts stated by the Alabama Court of Criminal Appeals. See the Examination, Report and Recommendation, Appendix A, pp. 6-7. Yarber was then released from custody but officers were assigned to remain with him, ostensibly for his protection. In truth, according to testimony at Yarber's trial, the officers were afraid that, left to his own devices, Yarber would flee the

state and become unavailable as a witness to testify against Mylar. Testimony from the various officers was to the effect that they fully intended to fulfill their agreement not to prosecute Yarber.

Later Yarber appeared at a preliminary hearing on Mylar's case and testified against him. Apparently, the state district judge ordered that a warrant be issued for the arrest of Yarber after hearing his testimony at this hearing. Yarber was tried for murder and convicted in February of 1976. At a hearing conducted just prior to the beginning of his trial, the court granted a defense motion to suppress Yarber's prior statements and his testimony at Mylar's preliminary hearing. It denied a motion to dismiss the indictment. Mylar testified against Yarber at that trial.

At Mylar's trial, Yarber was called to the witness stand but refused to

answer any question whatsoever even though the court found him in contempt. His testimony given at Mylar's preliminary hearing was read to the jury over defense objections.

YARBER'S TESTIMONY

The petitioner claims here as he did before that he was convicted on the uncorroborated testimony of an accomplice. That claim was found to be without merit by the magistrate 2/ on the first petition and no compelling reason has been presented why it should be reconsidered here.

The magistrate also found without merit Mylar's claim that Yarber's testimony should have been admitted because it had previously been suppressed.3/ Relying on United States v. Dowdy, 486 F.2d

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2/Appendix A, p. 8.

3/Appendix A, p. 9.

1042 (5th Cir. 1973), the magistrate noted that Yarber's Fifth Amendment privilege against self-incrimination was personal and could not be vicariously asserted by Mylar. Through retained counsel, Mylar argues now that Dowdy, supra., is a correct statement of the law, but seeks to distinguish it by arguing that while it is applicable to statements made by persons not aware of their right to remain silent, it should not be applicable to statements which are actually coerced or otherwise improperly induced. No reported case has been found in which any court has accepted the distinction argued by the petitioner. It has long been firmly recognized that the privilege against self-incrimination is personal to the witness. Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370, 50

L.Ed 652 (1906); Rogers v. United States, 340 U.S. 367, 71 S.Ct. 438, 95 L.Ed. 344 (1951); Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 81 S. Ct. 1347, 6 L.Ed.2d 625 (1961). The right may not be vicariously asserted. United States v. Colyer, 571 F.2d 941 (5th Cir. 1978); United States v. Rubin, 559 F.2d 975 (5th Cir. 1977); Hall v. United States, 413 F.2d 45 (5th Cir. 1969); Sharp v. United States, 410 F.2d 969 (5th Cir. 1969); United States v. Mayes, 512 F.2d 637 (6th Cir. 1975); United States v. Zoura, 497 F.2d 1001 (7th Cir. 1973); United States v. Howell, 470 F.2d 1064 (9th Cir. 1972). Even if there is doubt whether the witness knowingly and voluntarily waived the right against self-incrimination, the defendant has no right to assert the violation of the witness' Fifth Amendment right. United States v. Wise, 603 F.2d

1101 (4th Cir. 1979).

The Fifth Circuit has recently held that defendants in a drug conspiracy case would not be permitted to assert in their own behalf, the violation of Fifth Amendment rights of a witness even though statements and testimony of the witness had been obtained in circumstances strongly suggesting psychological coercion. United States v. Fredericks, 586 F.2d 470 (5th Cir. 1978).

The circumstances under which Yarber's statement and testimony were secured most assuredly do not rise to the level of physical torture or unremitting prolonged interrogation condemned as violative of due process in Bradford v. Johnson, 354 F.Supp. 1331 (E.D.Mich. 1972), aff'd., 476 F.2d 66 (6th Cir. 1973); see also LaFrance v. Bohlinger, 499 F.2d 29 (1st Cir. 1974), cert.denied, 419 U.S. 1080, 95 S.Ct. 669, 42 L.Ed.2d

674 (1974).

On his first petition, Mylar argued that Yarber's preliminary hearing testimony should not have been admitted because no proper predicate was layed. Focusing on the confrontation/cross-examination issue, the magistrate found against him. Appendix A, pp. 9-12. Except for noting that the Supreme Court decision in Ohio v. Roberts, ___ U.S. ____, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) lends further support to the court's opinion, no further discussion is necessary on that aspect of the claim. In the present petition, however, Mylar has expanded his argument to include a claim that Yarber's unavailability was procured through acts of the State of Alabama in withdrawing the promise of immunity previously made to him.

The prosecution may not use the prior testimony of a witness whose unavailabil-

ity at trial was caused by its own fault. Motes v. United States, 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150 (1900) (Declarent's absense "was plainly to be attributed to the negligence of the prosecution" which had released the witness without bail "in charge, not of an officer, but of another witness for the government.") The state must make a reasonable effort to secure the live testimony of its witnesses. Ohio v. Roberts, supra.

Ordinarily, a co-defendant who claims the privilege at trial after testifying at an earlier proceeding is unavailable for hearsay purposes. Woodward v. State, 21 Ala.App. 417, 109 So. 119 (1926). See United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977). Compare rule 804(a), Federal Rules of Evidence. The courts have consistently held that a grant of immunity is discretionary and the prose-

cutor has no constitutional obligation to seek immunity for a witness. United States v. Herman, 589 F.2d 1191 (3rd Cit. 1978); United States v. Lang, 589 F.2d 92 (1978). In Alabama prosecuting attorneys and judges have discretionary authority to grant immunity from prosecution in exchange for truthful testimony as a state witness. Gibson v. State, Ala.Cr. App., 375 So.2d 504, 511 (1978), aff'd., 375 So.2d 514. Prosecutors may initially choose not to prosecute a particular defendant. See Cates, Can We Ignore Laws? - Discretion Not to Prosecute, 14 Ala.L.Rev. 1 (1961).4/

4/A number of Alabama statutes provide for immunity in specified circumstances:

Alabama: Ala. Const. art. VIII, §189 (1901)(Contested elections; immunity from prosecution for persons other than an accused); Ala. Code 1975, § 6-6-181, (creditors' bills for discovery; immunity [continued on next page]

In order to prevail on this aspect of his claim, Mylar "must be prepared to show that the [state's] decisions were made with the deliberate intention of

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(continued fn. 4)

from use on an indictment for fraud; id, § 8-1-130, (illegal contracts for future delivery; immunity from use, and pardon for the offense); id, § 8-1-157, (actions on gaming contracts; immunity from prosecution for party); id, § 13-7-29,(testimony before grand jury in gaming and lottery cases; immunity from prosecution); id, § 17-15-3, (contested elections; testimony as to illegal vote; immunity from prosecution for voting at such election if testimony is full and true); id, § 25-4-141, (industrial relations; immunity from prosecution); id, §§ 28-4-317 and 24-8-318, (liquor law; testimony before grand jury; same); id, § 28-4-320, (liquor law, immunity from prosecution and use for agent, employee or principal); id, § 28-4-321, (liquor law violation; immunity from prosecution); id, § 28-4-134, (same, immunity from use); id, § 28-4-272, (proceeding for seizure of liquors; immunity from prosecution and use); id, § 37-1-91, (public service commission;immunity from prosectuion); id § 37-8-4, (testimony before grand jury as to railroad rate offenses; same); id, § 40-2-20, (department of revenue; same).

distorting the judicial factfinding process." United States v. Herman, supra., at 1204. As reprehensible as the conduct of the law enforcement officers was, the record does not support a finding that the fact-finding process was intentionally or otherwise distorted. It is perfectly clear that at least some of the officers who participated in the interrogation of Samuel Yarber deliberately violated his rights by withholding the Miranda warning. They compounded the violation by promising him immunity from prosecution knowing it was a promise they probably could not keep. In Alabama, law enforcement officers have no authority whatsoever to grant immunity from arrest or prosecution to an accused. Yarber v. State, 368 So.2d 868, Ala.Cr. App. (1978), cert. denied, 368 So.2d 871 (1978); Yarber v. State, 375 So.2d 1212, Ala.Cr.App. (1977), rev. on other

grounds, 375 So.2d 1229 (1978), aff'd. on remand, 375 So.2d 1231, Ala.Cr.App. (1978), rev. on other grounds, 375 So.2d 1231, Ala.Cr.App. (1978), rev. on remand, 375 So.2d 1236, Ala. Cr.App. (1979). Likewise, prosecuting attorneys are without authority to grant immunity to an accused. As noted by the Alabama Court of Criminal Appeals:

> [T]o clothe them with such power and authority would strike at the very heart of our system of criminal justice and oust the courts of power invested in them by the constitution and statutes.

Gibson v. State, supra., at 511.

In order to prove this claim, Mylar would have to show that the officers had no intention of trying to keep their promises and that they accurately predicted the course which events would take in connection with their investigation which was at that time in its very early stages. The officers

testified that when Yarber gave his statement he was not then a suspect and that they fully intended to keep their promise to the extent that they could. Yarber was not, in fact, charged until after Mylar's preliminary hearing when the presiding judge at that hearing ordered his arrest.

It is extremely unlikely that those officers could have predicted the course which their case would take, for that course was, to a large extent, dependant upon the discretionary decisions of officers not then involved. The robbery of the 2010 Lounge and the kidnapping of Mrs. Knabe and Mr. White occurred in the City of Birmingham within the jurisdiction of the District Attorney for the Birmingham Division of the Jefferson County Circuit Court. It was that official who would decide whether to prosecute Mylar or Yarber for those

crimes. Though one of his investigators was present, the District Attorney for the Birmingham Division was not consulted. Any decision later made by him, for or against prosecution, was clearly not part of any plan devised before Yarber's interrogation.

The murder and rape of Mrs. Knabe and the murder of Mr. White occurred in the Bessemer Division of the court. The Assistant District Attorney for that division was the official directly responsible for prosecuting those offenses. The testimony of Sgt. C. C. Gillespie at Yarber's suppression hearing demonstrates that the Assistant District Attorney for the Bessemer Division was not a participant in any alleged scheme on the part of law enforcement officials. After testifying that he first consulted with his superior in Jefferson County Sheriff's Department

and with the Assistant District Attorney for the Bessemer Division, Gillespie testified:

> I told Yarber that I would enter into their agreement with him that if we believed his story that I would not arrest him. But I also told him that as far as I knew, nobody in the State of Alabama but a legal body, like a grand jury or a court could give him immunity and not to expect that he was getting immunity from us from the Sheriff's office, but as - personally or as a representative from the Sheriff's office - I would not arrest him. (Emphasis Supplied)

Yarber Hearing Transcript, p. 58. That testimony is corroborated by that of Sgt. Paul Hearst of the Birmingham Police Department who testified that Gillespie had told Yarber that he would not arrest him "but couldn't say what the court would do...." Yarber Hearing Transcript, p. 50.

In order to rule for the petitioner on this claim, the court would have to find that the law officers had a thorough understanding of both state and federal

case law governing the use of prior testimony in circumstances such as those prevailing at the petitioner's trial. The amount of reported litigation in this area demonstrates that it is an area of the law not always understood by lawyers and judges. It stretches logic to assume that police officers, even experienced ones, would have understood and would have intentionally created a situation which would have permitted them to obtain Yarber's testimony against Mylar while maintaining the right to prosecute Yarber. The claim is without merit and should be dismissed.

EFFECTIVENESS OF COUNSEL

The petitioner argues that his trial counsel was constitutionally ineffective, (1) because no request was made for voir dire to attempt to show that the state wrongfully caused Yarber to renege on his promise to testify; (2) no motion to

exclude the state's evidence was made; and (3) counsel did not file an appellate brief. The circumstances giving rise to the use of Samuel Yarber's prior testimony has been adequately discussed and requires nothing further here. In Alabama, failure of the state, in a criminal case, to present a prima facie case requires the court, on motion of defendant, to exclude all the state's evidence. Randolph v. State, 100 Ala. 139, 13 So. 792 (1893). Failure of trial counsel to move to exclude the state's evidence would fall below constitutionally acceptable standards only if the motion would have been meritorious if made. The right to counsel means the right to effective counsel. It means "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective

assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), mof'd. on other grounds, 289 F.2d 928, cert. denied, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). In view of Yarber's testimony, it is specious for petitioner to argue that the state failed to present a prima facie case against him. The motion to exclude would have been nothing more than a futile gesture. Mylar's attorneys were not ineffective in failing to make the motion.

Mylar's claim that he was denied the effective assistance of counsel on appeal because no brief was filed cannot be disposed of so easily. The Alabama Court of Criminal Appeals is required to "consider all questions apparent on the record or reserved in the circuit court and ... enter such judgment as the law demands."[5/] Because of that statute,

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5/Section 12-2-240, Code of Alabama 1975.

appellants in criminal cases in Alabama are not required to file briefs. Watts v. State, Ala.Cr.App., 337 So.2d 91 (1976). As noted by the respondents, it is not unusual for the Alabama appellate courts to reverse criminal convictions either on points not raised in brief or when no brief at all is filed. See Bertalsen v. State, 20 Ala.App. 539, 103 So. 480 (1925); French v. State, 28 Ala. App. 147, 180 So. 592 (1938); Johnson v. State, 257 Ala. 644, 60 So.2d 818 (1952); Cowart v. State, 44 Ala.App. 201, 205 So.2d 250 (1967).

The petitioner's court appointed counsel on appeal filed no brief and the conviction was affirmed on the record as submitted. The Court of Appeals noted that it had "carefully searched the record for errors injuriously affective the substantial rights of appellant and have found none." Petitioner's counsel

then petitioned the Court of Criminal Appeals for rehearing arguing only the claim that the trial judge had improperly ordered Mylar to leave the witness stand during his redirect examination. After failing to get a rehearing, the attorney then petitioned the Alabama Supreme Court for a writ of certiorari on the same ground. That petition was denied.

Claims relating to the effectivess of counsel may be based upon either the due process clause of the Fourteenth Amendment or the assistance of counsel clause of the Sixth Amendment as incorporated by the due process clause of the Fourteenth. Due process is violated only if the conduct of counsel is "so grossly deficient as to render the proceedings fundamentally unfair." Kallie v. Estelle, 515 F.2d 588, 591 (5th Cir. .975). This is so "because the

system has failed, and the state's consequent imprisonment or fine of the defendant is fundamentally wrong." Fitzgerald v. Estelle, 505 F.2d 1334, 1336 (5th Cir. 1974), en banc, cert. denied, 442 U.S. 1011, 95 S.Ct. 2636, 45 L.Ed.2d 675 (1975).

The United States Supreme Court has recently abolished the distinction between retained and court appointed counsel as to the degree of protection due to the criminal defenants. Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Bedfore the Supreme Court decision in Cuyler, the Fifth Circuit had enunciated different standards for retained as compared with court appointed counsel in Fitzgerald, supra. In Cuyler, Justice Powell explained:

> A proper respect for the Sixth Amendment disarms petitioner's contention that defendants who retain their own

> lawyers are entitled to less protection than defendants for whom the State appoints counsel. We may assume with confidence that most counsel, whether retained or appointed, will protect the rights of an accused. But experience teaches that, in some cases, retained counsel will not provide adequate representation. The vital guarantee of the Sixth Amendment would stand for little if the often uniformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection. Since the State's conduct of a criminal trial itself implicates the state in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.

64 L.Ed.2d 333, at 344. Cuyler has been applied retroactively in the Fifth Circuit. See Perez v. Wainwright, 627 F.2d 762 (5th Cir. 1980).

The constitution requires that counsel take the role of active advocate in behalf of his client, as opposed to that of amicus curiae. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18

L.Ed.2d 492 (1967). He is required to "support his client's appeal to the best of his ability." The Fifth Circuit Court of Appeals has recently found conduct by retained counsel similar to that of Mylar's attorney to be obviously incompetent. In Passmore v. Estelle, 607 F.2d 662 (5th Cir. 1979), the petitioner was convicted in a Texas state court of burglary and sentenced to life imprisonment as an habitual offender. On appeal, his retained counsel, who had not represented him at trial, filed a one sentence brief which contained no more than a prayer for relief: "Appellant prays that this case be reversed and remanded for new trial." The Texas Court of Criminal Appeals examined the record "in the interest of justice" and affirmed in an unreported one paragraph per curium opinion. Referring to appellant's one sentence brief the court said, "Obviously,

this presents nothing for review." The Fifth Circuit said, "It is obvious that the representation by petitioner's retained counsel was incompetent." In the opinion of the magistrate, Mylar's claim that he was denied effective assistance of counsel on appeal is governed by Passmore, supra., which compels the decision that relief be granted. The one sentence brief filed by Passmore's attorneys was the equivalent of no brief at all. Though not required to do so, the Texas Court of Criminal Appeals examined the record for error. The Fifth Circuit held that Passmore's appellate counsel was ineffective and this court must find Mylar's counsel was ineffective. As was said in similar circumstances:

> Such review on the court's own motion is a most desirable protection against violation of fundamental rights. However, without a brief or argument the Oklahoma court's review

> was understandably narrowed. The procedure was transformed into one lacking the "active role of an advocate . . . " Entsminger v. Iowa, 386 U.S. 748, 751, 87 S.Ct. 1402, 18 L.Ed.2d 501. Whether there were particular issues which were not illumined so that the appeal was prejudiced, we cannot know since the facts were not developed.

Hill v. Page, 454 F.2d 679, 682 (10th Cir. 1971), Judge Holloway concurring and dissenting.6/

Mylar is entitled to an appeal with the active assistance of counsel and his petition should be granted on this claim.

6/ Hill is very much similar to the case presently before the court. There the rules of the appellate court in the State of Oklahoma provided that no brief was required. Under those circumstances the transcript of the trial and the other record on appeal was examined by the appeals court for "fundamental error." The attorney twice requested rehearing and supported his requests by brief. The Tenth Circuit held that such a procedure did not violate Anders, supra. This holding is, of course, in conflict with the Fifth Circuit's decision in Passmore.

CONCLUSION

In accord with the above, it is hereby recommended that the petition for habeas corpus relief be denied on all claims except the claim that the petitioner was denied the effective assistance of counsel on appeal. On that claim, it is recommended that the petition be granted and that the respondents be ordered to release the said Danny Ray Mylar from further custody resulting from his conviction for murder, unless within a reasonable time, not to exceed one hundred and eighty days (180), the State of Alabama shall afford the petitioner an out-of-time appeal with the assistance of counsel or, in the alternative, shall afford him a new trial.

Either party may file specific written objections to this report within ten (10) days of its date.

The Clerk is directed to serve a copy of this report and recommendation upon the petitioner, Danny Ray Mylar, and the Honorable Charles Graddick as Attorney General for the respondent, State of Alabama.

DONE this 6th day of March, 1981.

/s/ Edwin L. Nelson
EDWIN L. NELSON
UNITED STATES
MAGISTRATE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

DANNY RAY MYLAR, a/k/a DANNY RAY MILES,	Filed in Clerk's Office Northern District of Alabama APR 18 1979
Petitioner,	James E.Vandegrift, Clerk United States
-vs-	
LIONEL BRAGAN, Warden, Jefferson County Jail, Birmingham, Alabama; STATE OF ALABAMA,	District Court By:/s/Dele W. Maecle (sic)
	NO. CA 78-A-0071-S
Respondents	

EXAMINATION, REPORT AND RECOMMENDATION

This is a petition for a writ of habeas corpus filed by a person in custody pursuant to a judgment of a court of the State of Alabama, 28 U.S. § 2254 (b). Danny Ray Mylar was convicted in the Circuit Court of Jefferson County, Alabama, Bessemer Division, on an indictment charging first degree murder and was sentenced to life imprisonment. The

Alabama Court of Criminal Appeals affirmed, 343 So.2d 801 (1977) and certiorari was denied in the Alabama Supreme Court, 343 So.2d 806 (1977).[1]

On this petition, Mylar alleges, (1) he was convicted on the uncorroborated testimony of an accomplice; (2) the trial judge permitted the prosecution to use the prior testimony of petitioner's accomplice against him even though such testimony had previously been excluded from the trial of the accomplice because it was involuntarily secured; (3) no predicate was laid by the state for the use of the accomplice's testimony; (4) he was denied the right to cross-examine the accomplice; (5) the trial judge ordered

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[1]Mylar was also convicted of common law robbery and sentenced to 18 years' imprisonment on an indictment growing out of the same incident as did his conviction. The Alabama Court of Appeals affirmed, 366 So.2d 346 (1979).

him off the stand during his own re-direct examination denying him the right to give testimony in his own behalf; (6) prejudicial comments were made by the trial judge in the presence of the jury; (7) the trial judge permitted the prosecution to question the petitioner about a list of his "sexual conquests"; (8) his attorneys were constitutionally ineffective: (a) because they did not effectively challenge the state's use of the accomplice's prior testimony; (b) because they did not make a motion to exclude the uncorroborated testimony of the accomplice; and (c) because they did not file a brief in the Alabama Court of Criminal Appeals and raised only "two minor issues" in the Alabama Supreme Court; and, (9) his attorneys have refused to provide him with a transcript of his trial. In response to several formal orders and numerous informal

requests, the State of Alabama has supplied the court with most of the records of the State Trial Court including a transcript of a preliminary hearing. These records, together with voluminous documents filed by petitioner, constitute the record before this Court.

A. EXHAUSTION OF STATE REMEDIES

The State of Alabama concedes that the issues innumerated (1) through (6) above were considered by the Alabama Court of Criminal Appeals.[2] They were presented to the trial court on a petition for a writ of error coram nobis

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[2] It is not clear how the state arrived at this conclusion. No appellate brief was filed on Mylar's behalf and not all the habeas issues are treated in the opinion of Appeals Court. The state may have relied on the statement in that court's opinion that the court had "carefully searched the record for errors injuriously affecting the substantial rights of appellant and have found none." 343 So.2d at 806. See also § 12-22-240, Code of Alabama, 1975.

which was denied without hearing on August 4, 1977. That action was affirmed by the Court of Criminal Appeals on October 25, 1977 and certiorari was denied November 28, 1977 in unreported orders. Mylar has exhausted state remedies as to those claims. It appears that petitioner raised his claim of ineffective assistance of counsel and his claim that the trial court should not have permitted the prosecution to question him about a list of his paramours for the first time on appeal from the denial of his coram nobis petition. The claim that his attorneys have refused to provide him with a transcript of his trial is raised for the first time in this petition. If Mylar has not exhausted state remedies as to the latter three claims, then this petition would be subject to dismissal under the rule of Galtieri v. Wainwright,

582 F.2d 348 (5th Cir. 1978) which requires that state remedies be exhausted as to all claims before the United States District Court will consider a petition for a writ of habeas corpus by the state prisoner on the merits. However, a state prisoner is not required to pursue a claim through the state courts where there is no state procedure whereby he may effectively present his claim.

Generally, Alabama provides two separate and distinct means by which convicted persons may mount attacks on their criminal convictions - the writ of error coram nobis, Johnson v. Williams, 244 Ala. 391, 13 So.2d 683 (1943) and the writ of habeas corpus, Section 15-21-1, Code of Alabama, 1975. A petition for the writ of error coram nobis brings a judgment before the original trial court for correction because of an error of

fact not evident from the face of the record that would have prevented the judgement. The error of fact must have been unknown to the Court and to the convicted party at the time of trial. Smith v. Hixon, 149 F.Supp. 283 (So.Dist.Ala. 1957); Smith v. State, 245 Ala. 161, 16 So.2d 315 (1944); Groce v. State, 48 Ala.App. 709, 267 So.2d 499 (1972). The writ is not a substitute for appeal, Groce v. State, supra. Under the rule of Groce, if the Alabama Court of Criminal Appeals did not have before it Mylar's claim of error with regard to use of the list of names, then he could not have raised it later on coram nobis. Neither is the claim cognizable in the state courts on a petition for writ of habeas corpus. While the applicable statute appears to create a remedy for a broad range of complaints, the Alabama case law has severely restricted utility of the

writ. Generally, the writ issues against void judgments but not against judgments which are merely voidable. Weatherington v. City of Birmingham, 52 Ala.App. 77, 289 So.2d 645 (1973), cert.den., 292 Ala. 757, 289 So.2d 649 (1974); Hable v. State, 41 Ala.App. 398, 132 So.2d 271, cert.den., 368 U.S. 883 (1961); Flowers v. State, 4 Ala.App. 221, 59 So. 238 (1912). Habeas corpus relief will be granted only where the record shows a want or excess of jurisdiction in the trial court, State v. Thurman, 205 Ala. 677, 88 So. 899 (1921); Herrmann v. Robinson, 43 Ala.App. 422, 192 So.2d 251 (1966). Neither inadequacy of counsel, Argo v. State, 41 Ala.App. 347, 133 So.2d 201, cert.den., 272 Ala. 699, 133 So.2d 203 (1961); Brooks v. State, 41 Ala.App. 204, 133 So.2d 196, cert.den., 272 Ala. 561, 133 So.2d 198 (1961), cert.den., 360 U.S. 991 (1962) nor alleged irregular-

ities in the conduct of the trial, Ex parte Thomas, 270 Ala. 411, 118 So.2d 738, cert,den., 363 U.S. 822 (1960); Wilkie v. State, 41 Ala.App. 358, 132 So.2d 390 (1961); Hardemann v. State, 19 Ala.App. 563, 99 So. 53 (1924) will support habeas relief.

It follows from the above discussion concerning the offices of the writs of error coram nobis and of habeas corpus in Alabama that neither are available to petitioner to obtain a copy of his trial transcript from his attorneys. In the context of an attack on a criminal conviction, the magistrate is aware of no state procedure available to Mylar to obtain that transcript and the State of Alabama has pointed to absolutely none.

There remains the question of whether Mylar may pursue his claim of ineffective assistance of counsel by way of a writ of error coram nobis. The Alabama cases are far

from clear. In Ex parte Gammon, 255 Ala. 502, 52 So.2d 369 (1951) and Ex parte Argo, 41 Ala.App. 442, 137 So.2d 755, cert. dismissed, 273 Ala. 201, 137 So.2d 757 (1961), cert.den., 369 U.S. 862, 82 S.Ct. 952, 8 L.Ed.2d 20, the Alabama courts held that a claim of ineffective assistance of counsel at trial was not cognizable on coram nobis. In Peaden v. State, 272 Ala. 72, 152 So.2d 136 (1963), cert.den., 375 U.S. 854, 84 S.Ct. 114, 11 L.Ed. 80 the Alabama Supreme Court apparently considered such a claim on the merits without comment on the propriety of doing so in light of Gammon and Argo. There is no question that a claim of outright denial of counsel can be heard on coram nobis. Dillard v. State, 283 Ala. 245, 215 So.2d464 (1968), Mayola v. State, Ala.Crim.App. 337 So.2d 105, cert. den., 337 So.2d 107 (1976); Rogers v. State, Ala.Crim.App. 332 So.2d 165 cert.

den., 332 So.2d 168 (1976); Browning v. State, 57 Ala. App. 217, 326 So.2d 783 (1976). The Alabama cases have all concerned claims of ineffective assistance of counsel at trial and have been rejected on the basis that they concerned matters known to the petitioner at trial and should have been raised on appeal. It does not appear that a claim of ineffective assistance on appeal has ever been considered by the appellate courts of Alabama.

In Staten v. Alabama, 576 F.2d 654 (1978), the United States Court of Appeals for the Fifth Circuit had before it a claim similar to Mylar's, e.g., his attorney did not file an appellate brief on his behalf. Counsel in Staten was court appointed and filed a "no merit" letter indicating his opinion that Staten's direct appeal was frivolous. Mylar's attorney was retained and filed

nothing prior to the appellate decision apparently being content to rely on the court to search the record for error, §12-22-240, Code of Alabama, 1975. The Staten court reversed the granting of habeas relief to an Alabama prisoner holding without discussion and without citing any authority that he could present his claim in a state petition for coram nobis and would be required to do so in order to exhaust state remedies.

Until the decision in Staten, the magistrate entertained serious doubt that this claim could be presented in the Alabama courts. That doubt has not been fully dissipated by the rather perfunctory disposition of the question at the appellate level. However, perfunctory or not, the Fifth Circuit's decision is binding on this Court and we are not free to disregard it. Because there has been no exhaustion as to this last claim,

Galtieri, supra, mandates a dismissal without considering the exhausted claims on the merits and that will be the recommendation of the magistrate.

Ordinarily, a decision to dismiss for failure to exhaust state remedies would end the matter. In the particular circumstances of this case created by the undue and unusual delay in consideration of it, the amount of time and effort expended in its consideration and in an effort to facilitate disposition of anticipated future petitions filed by this petitioner, some discussion of the various claims may prove useful.

B. THE FACTS

The facts of this robbery, kidnapping and double murder are set out in detail in the opinion of the Alabama Court of Criminal Appeals. The court's recitation is adequately supported by the record. To some degree it is the basis for

comment in this opinion, thus it is set out in its entirety:

> The victims were Mrs. Clarice Knabe and Ronald Harvel White. Appellant was indicted for killing White with a .38 caliber pistol and one Samuel "Bud" Yarber was indicted and convicted in the shooting death of Mrs. Knabe and he, too, was sentended to life imprisonment. This is a classical case of two murder suspects, each trying to put the blame on the other and thus exculpate himself from a murder conviction. Their efforts backfired and justice still reigns supreme.
>
> This tragic episode began on the late afternoon of November 3, 1975, when Appellant went to the apartment of Yarber around 6:30 p.m. About 45 minutes later they left in Yarber's car to go out drinking. They went to several bars and drank beer at each. Appellant asked Yarber to accompany him to K-Mart's Sporting Goods Department in order to purchase some ammunition for Yarber's .38 caliber pistol which appellant had previously asked to borrow. They went to K-Mart, where appellant purchased a box of ammunition around 9:00 p.m. that night. This purchase was recorded in a book which the manager of the Sporting Goods Department testified he was required by law to keep.
>
> The two men then returned to Yarber's apartment where Yarber gave appellant his pistol. As appellant was loading the pistol the pistol discharged and

the bullet lodged in the wall or ceiling of the living room. Yarber became provoked at appellant for discharging the pistol in his apartment for fear he would be evicted. Appellant apologized to Yarber and carried the pistol out of the apartment and put it in his car.

A short while later the two men left in appellant's car and went to the 2010 Lounge in downtown Birmingham, arriving there around 9:30 p.m. They parked in the rear parking lot and entered the lounge through the back door. There were a number of customers in the place at the time. They were all drinking and watching a football game on television. The football game was over just before 11:00 p.m. and everyone left except the bartender, Mrs. Clarice Knabe, Mr. Ronald Harvel White, appellant and Mr. Yarber. At this time, according to the testimony of Mr. Yarber given at a preliminary hearing, appellant pulled out the pistol he had borrowed from Yarber and ordered Mrs. Knabe and Mr. White to put their hands up and said, "This is a stick-up." Appellant ordered Yarber to lock the front door and then demanded all the money from Mrs. Knabe and Mr. White. Mrs. Knabe protested that the owner of the lounge did not leave any money in the place. Appellant walked behind the bar to check for himself. Appellant ordered White to empty his pockets on the counter and White put his wallet on the bar. At this time there was a knock on the front door and appellant ordered Mrs. Knabe and Mr. White out

the back door and into the back seat of his car. Appellant ordered Yarber to drive the car. Yarber asked appellant where they were going and appellant told him to drive to the place where they had zeroed Yarber's deer rifle a few weeks previously. Yarber began traveling south on I-65 toward Hoover, Alabama and turned south on Highway 31. They traveled south on Highway 31 to Highway 150 going toward Bessemer. During the entire trip from the 2010 Lounge appellant kept asking Mrs. Knabe what she was going to tell the owner of the lounge and she said "We're going to tell him that two colored men came in and robbed us." Appellant asked White what he was going to say and White told him he was going to say the same thing that Mrs. Knabe was going to say.

Appellant pointed the pistol at Mrs. Knabe and White in the back seat and told them to take off all their clothes. After they had completely disrobed appellant told Mrs. Knabe to get in the front seat between him and Yarber and she did. When they arrived at the appointed place appellant ordered Mrs. Knabe out of the car and told White to keep his hands up inside the car. Appellant then proceeded to have sexual intercourse with Mrs. Knabe on the trunk of the car while Yarber and White remained inside the car. He then ordered White out of the car and told Mrs. Knabe to lie on her back on the ground. Appellant ordered White to get on top of Mrs. Knabe. While they were in that position, according to

sworn testimony given by Yarber at the preliminary hearing, appellant shot and killed both Mrs. Knabe and Mr. White. Appellant then reloaded the pistol and he emptied it again into the bodies of the two victims. Yarber saw appellant standing over the two victims with the pistol in his hand and said he did not know how many shots were fired but thought there were ten to fifteen. Appellant then got back in the car and told Yarber to return to Highway 31, and to find some deep water so that he could dispose of the gun.

As they drove along appellant directed Yarber to throw the clothes of the victims out of the car at different places and intervals along the highway. He then had Yarber drive to Lake Purdy off Highway 119 where appellant got out of the car and threw the pistol as far into the lake as he could throw it, and threw two unspent cartridges several feet out into the lake.

While in the car on the say back to town appellant pressed Yarber to take some of the money that he had obtained in the robbery of Mrs. Knabe and Mr. White. Yarber told appellant that he did not want the money but he got around fifty dollars anyway, and appellant coached Yarber as to their alibi on this fateful night.

343 So.2d 802, 803.

C. THE TESTIMONY OF SAMUEL YARBER

During the state's case in chief, Yarber was called as a witness for the state but refused to answer any question. Over objection, the trial court ruled that Yarber was an unavailable witness and permitted the prosecution to read his testimony from the transcript of Mylar's preliminary hearing. At that hearing, Mylar was represented by retained counsel who subjected Yarber to a thorough and searching cross-examination and who also represented Mylar at trial.

Petitioner's contentions with regard to this testimony will be taken in the order in which he makes them. He claims first that Yarber was an accomplice in the crime and that his testimony is uncorroborated. The pertinent Alabama statute provides:

> "A conviction of felony cannot be had on the testimony of an accomplice, unless corroborated by other evidence

> tending to connect the defendant with the commission of the offense; and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, it is not sufficient."

Section 12-21-222, Code of Alabama, 1975. In order for such corroborative evidence to be sufficient, it is not necessary that it be strong or that it alone be sufficient, to warrant a finding of the defendant's guilt, Peoples v. State, 56 Ala. App. 290, 321 So.2d 257 (1975); Cunningham v. State, 54 Ala.App. 656, 312 So.2d 62 (1975). It may be entirely circumstantial Hudson v. State, 49 Ala.App. 283, 270 So.2d 828 (1971); Brown v. State, 31 Ala.App. 529, 19 So.2d 88 (1944).

Mylar is apparently unaware of a line of federal cases in this circuit which permits a defendant in a federal prose-

cution to be convicted on the uncorroborated testimony of an accomplice if it is not on its face incredible or otherwise unsubstantial, U. S. v. Iacovetti, 466 F.2d 1147 (5th Cir. 1972), cert.den., 410 U.S. 908; U.S. v. Prentiss, 446 F.2d 923 (5th Cir. 1971); U.S. v. Bays, 448 F.2d 977 (5th Cir. 1971); U.S. v. Stanley, 433 F.2d 637 (5th Cir. 1970); Tillery v. U.S., 411 F.2d 644 (5th Cir. 1969). There would thus appear to be no federal constitutional impediment to the use of uncorroborated accomplice testimony to sustain a conviction. Petitioner has not pointed to any particular constitutional right which he believes was violated. Because the federal courts cannot ordinarily require a higher standard of constitutional law of state courts than they require of themselves, Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), it follows that

Mylar must fall back on an alleged violation of a state procedural rule to support his claim for relief. Such an error will support habeas relief only if it effected a denial of his due process rights, Anderson v. Maggio, 555 F.2d 447 (5th Cir. 1977).

No due process rights were violated because the rule itself was not violated. Mylar testified in his own behalf and told a story essentially identical to that told by Yarber. The only significant difference was his complete reversal of the roles played by the two men. This testimony standing alone would be sufficient corroboration of Yarber. Additionally, there was testimony that Mylar purchased the ammunition used to commit the two murders. His fingerprints were found at the 2010 Lounge. At least two witnesses placed both Mylar an Yarber in the lounge on the evening of the

crimes. Bullets were found in the walls of Yarber's apartment and the lounge where Yarber testified they had been fired. Finally, the pistol used in the murders was found at the place where Yarber said it was thrown.

Next, petitioner claims that Yarber's testimony should not have been used because it had previously been suppressed in Yarber's own trial as being involuntarily given. The claim has no merit. The Fifth Amendment privilege against self-incrimination is personal to Yarber. Mylar may not object that Yarber's rights were violated, U.S. v. Dowdy, 486 F.2d 1042 (5th Cir. 1973).

The claim that no proper predicate was laid for the use of Yarber's prior testimony is likewise without merit. Again, this is a claim that the trial court violated its own state procedural rule and is subject to the holding of

Anderson v. Maggio, supra. The Alabama courts permit the use of such prior testimony if it was given: [1] under oath; [2] before a tribunal or officer having authority to take testimony and requiring an opportunity for cross-examination; [3] under circumstances affording the party against whom it is offered an opportunity to test the witnesses' credibility by cross-examination; [4] in a case where the issues and parties were substantially the same as the case in which it is offered; and, [5] where the witness is presently unavailable. Section 245.07(1), McElroy's Alabama Evidence, 3rd Ed., 1977, and cases cited therein.[3] The testimony of a witness at a preliminary hearing is admissible at a trial of the same case where the witness is not avail-

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[3] Compare Rule 804, FRE.

able at trial, Marler v. State, 67 Ala. 55 (1880); Adkinson v. City of Andalusia, 22 Ala.App. 131, 113 So. 469 (1927). Both the trial and appellate courts found that circumstances permitted the use of Yarber's prior testimony in conformity with the Alabama rule. The magistrate has found no federal cases which would indicate that the Alabama rule is in conflict with due process requirements.

Mylar claims he was denied the right to cross-examine Yarber in violation of the Sixth Amendment Confrontation Clause as applied to the states through the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). In Pointer, the Supreme Court held that testimony at a preliminary hearing of a now unavailable witness could not be used against the defendant at trial where the defendant was without counsel at the preliminary

hearing and was thus unable to cross-examine the witness. The court added. "The case before us would be quite a different one had Phillip's [the witness] statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine." 380 U.S. 400, 407. In Douglas v. Alabama, 380 U.S. 415 (1965), decided the same day as Pointer, the court reversed an Alabama conviction where the prosecutor, over objection, read into the record the confession of the defendant's accomplice who refused to testify for the reason that the defendant was "denied ... the right of cross-examination secured by the Confrontation Clause." 380 U.S. 415, 419.

In California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) the defendant, Green, was charged with furn-

ishing marihuana to a minor. Much of the state's evidence came from the minor, Porter. Prior to trial Porter gave a statement to a police officer strongly implicating Green. At a preliminary hearing he testified somewhat inconsistently though still naming Green as his supplier. He was extensively cross-examined by Green's attorney, the lawyer who later represented him in the trial. At trial Porter's testimony was at best "evasive." The state was permitted to examine Porter using his testimony at the preliminary hearing. Later his statement to the officer was placed in evidence. Both were admitted as evidence of the truth of the matters contained therein. The court further held that Porter's testimony at the preliminary hearing would have been admissible at trial even had he not been present because it was given under circumstances closely

approximating a typical trial.

In Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968), the court excluded the testimony of an accomplice given at a preliminary hearing because the accomplice was available as a witness for the state but was not called.

The Fifth Circuit Court of Appeals has considered the confrontation/cross-examination question on a number of occasions. The confrontation guarantee focuses upon "the right of the accused to confront and probe each of his accusers-a narrow adversary activity." U.S. v. Williams, 447 F.2d 1285, 1289 (1971) quoting The Supreme Court, 1969 Term, 84 Harv.L.Rev. 108, 112 (1970). In Hoover v. Beto, 467 F.2d 516 (1972, (en banc) cert.den. 409 U.S. 1086, 93 S.Ct. 703, 34 L.Ed.2d 673, the court, in approving the use of an out of court statement by an accomplice implicating the defendant,

held that the purpose of the "Confrontation Clause is to assure that the trier of fact is provided with a satisfactory basis for evaluating the truth of the evidence presented to it, whether the evidence is hearsay or non-hearsay and whether the satisfactory basis is provided by cross-examination or otherwise," 467 F.2d 516 at 532 citing Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). In U.S. v. Ragono, 476 F.2d 410 (5th Cir. 1973), the court found that a government witness should not have been permitted to relate to the jury the testimony of a third party given before a state commission which incriminated defendant because the third party was not subject to cross-examination by the defendant at the time of the testimony and did not testify at trial.

In the present case, the testimony of Yarber was given under oath at a prelimi-

nary hearing which in Alabama closely resembles a full flown trial.[4] The petitioner was represented by the attorney who later represented him at trial of this case. His lawyer cross-examined Yarber thoroughly and almost without limitation consuming 78 pages of transcript and approximately one and one-half hours. The entire testimony of Yarber took all of one afternoon and was concluded the following morning. It can hardly be said that the circumstances did not provide the trier of fact with a satisfactory basis for evaluating the truth of the evidence presented to it. Green v. California, supra.

D. CONDUCT OF THE TRIAL JUDGE

Mylar claims that he was prejudiced when the trial judge characterized as

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[4] See generally, Title 15, Chapter 11, Code of Alabama, 1975.

"foolishness" some of his attorney's cross-examination of Yarber. After the court reporter had completed his reading of Yarber's testimony defense counsel objected as follows:

> "[I] objected to the last three or four pages of re-direct examination on the grounds it was cumulative. The court said that there had been a lot of foolishness in the transcript with questions that I had asked on cross-examination too and that the jury had a right to hear all of it...."

TR. 230.

The record does indicate some irritation on the part of the trial judge with defense counsel at this and other times during the course of the trial. It does not disclose a degree of intervention or hostility which could have led the jury to a predisposition of guilty by confusing the functions of judge and prosecutor. U.S. v. Abrams, 568 F.2d 411 (5th Cir. 1978). U.S. v. Candelaria-Gonzalez, 547 F.2d 291 (5th Cir. 1977); U.S. v.

Gomez-Rojas, 507 F.2d 1213 (5th Cir. 1975).

Petitioner complains that the court unduly restricted his right to give testimony in his own behalf when it ordered him to leave the witness stand and return to his chair.[5] A trial judge is not required to remain silent and passive throughout a jury trial. He has a duty to facilitate the orderly progress of the trial and to clear the path of petty obstructions. It is his duty to discourage dilatory tactics of counsel. Adler v. U.S., 182 F. 464 (5th Cir. 1910). Clearly Mylar was given a full and complete opportunity to give his testimony and was in no way restricted.

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[5] Mylar's testimony covered 113 pages of a 410-page transcript. The incident complained of occurred after he had testified on direct and cross and had been examined on re-direct two times before. See TR. 392-93.

E. THE LIST OF "SEXUAL CONQUESTS"

During the course of his cross-examination of petitioner, the prosecutor undertook to inquire into a list of names, apparently compiled by petitioner, which the prosecutor characterized as a list of women with whom Mylar had had sexual relations. Over objection the court allowed the questions and the list itself was admitted into evidence.[6]

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[6] The portion of the transcript regarding this episode is set out in its entirety:

Q. Mr. Yarber and Mrs. Knabe got out of the car?

A. Yes, sir.

Q. Mr. Yarber have sexual relations with Mrs. Knabe?

A. Not to my knowledge; no, sir.

Q. Did he ever leave your sight?

A. They were to the rear of the car.

Q. Did you see them?

A. At times.

(continued f_n. 6)

Q. Was there any period of time when you could not see them?

A. No, not longer than a few minutes at a time.?

Q. Did you ever discover Mr. Yarber had taken off any of his clothes?

A. No,sir.

Q. Mr. Yarber directed Mrs. Knabe to lay on the ground?

A. Yes, sir.

Q. And told Mr. White to lay beside her?

A. He just said, "over there with her."

Q. Did he ever say, "lay down?"

A. Yes, sir.

Q. Did he ever make any direction or tell Mr. Yarber to have relations with her. I mean, excuse me, Mr. White have relations with her. Any conversation along those lines?

A. I don't know. Not that I recall.

Q. You had known Bud Yarber pretty well, hadn't you?

A. No, I mean other than the, around the Summit House apartment.

(continued fn. 6)

Q. Were you aware of whether or not he had any unusual or perverse attitudes or sexual hang-ups or habits or quirks?

A. I do not know how to answer that?

Q. Were you aware of it?

A. Not other than the fact that he collected pornographic magazines.

Q. Did he keep a list of women that he had relations with?

A. Not to my knowledge.

Q. Did you keep a list?

A. No, sir.

Q. Do you know Gale Russo from Youngstown, Ohio?

A. Yes, sir.

Q. Do you know Ava from Birmingham?

A. Yes, sir.

Q. Show you this--

MR. WILKINSON: I've seen the list, I object to it because it's irrelevant, immaterial and prejudicial perhaps; we object to it.

THE COURT: Overruled.

MR. WILKINSON: We except.

(continued fn. 6)

Q. (By Mr. Reynolds) Tell me what this is, please.

A. Tell you what it is?

Q. Yes, sir.

A. It's a list of people that I know?

Q. Just people that you know?

A. Yes, basically people that I have been interested in in one way, one form or another, I guess, over the years.

Q. Well, what does the initial "W" stand for on some of these things?

A. I don't know, I don't really remember that. When I was--Port au Prince, Haiti; that was nine years.

Q. You didn't make the list nine years ago, did you?

A. I have kept a list of people that I have known for probably longer than that other than that.

Q. And this list a compilation of other lists?

A. Sir?

Q. Is this list, did you compile this list from other lists--

MR. WILKINSON: Excuse me. Before you answer that we want to object to the whole line of inquiry.

(continued fn. 6)

THE COURT: Overruled.

MR. WILKINSON: On the grounds it's prejudicial.

THE COURT: The Court Reporter will write down your objection to every question asked about this and I will overrule your objection in advance, grant you exception to it.

Q. (By Mr. Reynolds) This list includes Mugsies wife in Youngstown, Ohio.

A. Yes, sir.

Q. Isn't it a fact, Mr. Miles, that this is a list of women that you have had sexual relations with? Did you keep a list of them?

A. No, sir.

Q. The initial "W" on here indicates "whore" or "prostitue?"

A. No, sir. I don't really recall.

Q. Well, you recall that Ava is number ninety-five on this list. Is that right?

A. I do not know.

Q. How many names are on the list after Ava's name is on the list?

A. Twenty-some names.

Q. This is your writing, isn't it?

(continued fn. 6)

A. Yes, sir.

Q. Would you read what it says by number forty there?

A. With craps.

Q. C-R-A-P-S. Runs down into another line, something with craps, behind playhouse, Youngstown, Ohio.

A. Youngstown, Ohio--I don't know.

Q. That was what you found interesting about that person?

A. I don't recall. There's a lot of people on that list.

Q. Number sixty-three was Nicky and Carter, Youngstown, Ohio, the interesting part about that?

A. You want me to break it down?

A. I want you to answer my question.

MR. WILKINSON: We object to the question again because it's assuming something that's not in evidence that "interesting part of the list," it's ambiguous.

THE COURT: Overruled.

Q. (By Mr. Reynolds) Number sixty-four W, took money back, Youngstown, Ohio. Sixty-five W, took purse, Youngstown, Ohio. Sixty-six W, front of diner, Youngstown, Ohio. Do you recall any of those names and what

Other than the reversal of the roles played by them, the only significant difference between the testimony of

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(continued fn. 6)

> that might mean to you as far as keeping a list of interesting people?
>
> A. It would just be a, how I've come to know them or something they've done, something amusing, something, I don't--that's all that list--and various lists that I have are for.
>
> A. There are not any men on this list, are there?
>
> A. I don't know if there are any on the list or not.
>
> Q. Would you look at it, see if you can find anything but ladies' names on that list?
>
> A. Joe. Micky.
>
> Q. What does it say about Micky?
>
> A. Abel's Cantina. Right in the cantina. That was a guy that came in. Jerry.
>
> Q. What's the wording after Jerry's name?
>
> A. San Francisco. That was a guy I used to work for in San Francisco. I don't know what all those are for.

Danny Ray Mylar and the testimony of Samuel Yarber was this: Yarber testified that while at the scene of the murders, Mylar took Mrs. Knabe to back of the car where he had sexual relations. Mylar's testimony did not include this incident.[7] It appears that by pursuing this line of questions, the prosecutor was seeking to show that Mylar was the kind of person who would have had sexual relations with his victim just before killing her thus supporting the testimony of Yarber while at the same time tending to discredit the testimony of Mylar. In other words, the prosecutor sought to show a bad character trait to imply that Mylar acted in conformity therewith. Mylar complains that the trial judge erred in permitting this

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[7] The autopsy on the body of Mrs. Knabe tended to confirm that she had engaged in sexual intercourse shortly before her death.

line of inquiry. He may very well be correct. See Section 140.01(10), McElroy's Alabama Evidence, 3rd Ed., 1977 and cases cited therein. The admissibility, vel non, of this evidence under state law does not determine the federal constitutional question. Brent v. White, 398 F.2d 503 (5th Cir. 1968), cert.den., 393 U.S. 1123, 89 S.Ct. 998, 22 L.Ed.2d 130 (1969). Ordinarily federal courts do not "sit to review state court actions on questions of the propriety of the trial judge's action in the admission of evidence." Lisenba v. California, 314 U.S. 219, 228, 62 S.Ct. 280, 286, 86 L.ed. 166 (1941); Burgett v. Texas, 389 U.S. 109, 99 S.Ct. 258, 19 L.Ed. 2d 319 (1967); Nees v. Culbertson, 406 F.2d 621 (5th Cir. 1969); Williams v. Wainwright, 427 F.2d 921 (5th Cir. 1970), vacated as to death penalty, 408 U.S. 941; Pleas v. Wainwright, 441 F.2d 56

(5th Cir. 1971); Mercado v. Massey, 536 F.2d 107 (5th Cir. 1976). However, federal habeas relief will lie to determine whether an error in applying a state evidentiary rule was of such a magnitude as to deny fundamental fairness in violation of the Due Process Clause. Hills v. Henderson, 529 F.2d 397 (5th Cir. 1976); Barnard v. Henderson, 514 F. 2d 744 (5th Cir. 1975); Heads v. Beto, 468 F.2d 240 (5th Cir. 1972), cert.den., 410 U.S. 969, 93 S.Ct. 1454, 35 L.Ed.2d 704 (1973). The erroneous admission of evidence will justify habeas relief only if it is "material in the sense of a crucial, critical, highly significant factor. Corpus v. Beto, 469 F.2d 953 (5th Cir. 1972), cert.den., 414 U.S. 932, 94 S.Ct. 236, 38 L.Ed.2d 162 (1973).

Use of the evidence of Mylar's list of names simply was not crucial to the decision in the trial. Both Mylar and

Yarber told essentially the same story with each potraying himself as an innocent victim and the other as the perpetrator of the crimes. It is too simple to view the jury's task as a mere credibility choice between the two of them. Were that the case the effort by the state prosecutor to paint Mylar as sexually promiscuous would be more serious. Both told stories which were somewhat incredulous. It is more probable that the jury, instead of believing one and disbelieving the other, simply disbelieve the protestations of innocence from both men. Neither of the two men showed any particular traits of good character sufficient to recommend them to a jury. Rather, they appeared as two criminals, equally guilty, each trying to shift his guilt to the other. It would have been an aberration had the jury found either worthy of belief. When

viewed in this light, this mild attack on the character of the petitioner pales into insignificance.

F. THE TRANSCRIPT

The claim that Mylar's attorneys refused to give him his trial transcript does not present a constitutional claim.

G. EFFECTIVENESS OF COUNSEL

The petitioner's claims that his attorneys were ineffective because they were unusccessful in preventing the use of Yarber's prior testimony and did not move to exclude such testimony do not present constitutional questions. As set out above, the use of such testimony was permissible and counsel cannot be faulted for failing to successfully advance an incorrect position. The claim that they failed to file an appellate brief is somewhat more troublesome.

The record shows that no brief was filed in the Alabama Court of Criminal

Appeals. [Letter to petitioner from the Clerk of that court dated April 8, 1977] A motion for rehearing accompanied by brief of counsel was filed on February 15, 1977 and denied without opinoin on March 1, 1977. Thereafter a petition for certiorari with brief was filed by Mylar's attorneys. It was also denied.

As noted in Section A. above, this claim has not been properly presented to the state courts. Mylar may present the claim on a petition for a writ of coram nobis, Staten v. Alabama, supra. Because the claim has not been considered by any Alabama Court, it would be inappropriate to comment on it here, except to reiterate that it is the failure to exhaust this claim which prevents a decision on the merits here. Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978).

H. CONCLUSION

It is recommended that the petition

for a writ of habeas corpus be dismissed for failure to exhaust state remedies on the claim of ineffective assistance of counsel on appeal.

This recommendation is governed by Rule 2(c) of the Rules Governing Jurisdiction and Authority of United States Magistrates in this Court which provides that either party may file specific objections to the magistrate's report in writing within ten (10) days of its date.

The Clerk is directed to furnish the petitioner and the defendant through its attorney of record with a copy of this report and recommendation and the Court's proposed judgment.

DATED, this 8th day of April, 1979.

s/s Edwin L. Nelson
EDWIN L. NELSON
United States
Magistrate

* * * * *

APPENDIX B

Danny Ray MYLAR, a/k/a Danny Ray Miles, Plaintiff-Appellant,

v.

STATE of ALABAMA, Defendant-Appellee.

No. 81-7412.

United States Court of Appeals, Eleventh Circuit.

April 1, 1982.

The United States District Court for the Northern District of Alabama, Clarence W. Allgood, J., denied habeas corpus application by State prisoner, and petitioner appealed. The Court of Appeals, Johnson, Circuit Judge, held that counsel's failure to file brief with appeal constituted ineffective assistance of counsel, even though State rule permitted filing of appeal without filing brief and required appellate court to review record for error apparent on the record.

Reversed and remanded with instructions.

1. Criminal Law 641.13(1)

To establish ineffective assistance of counsel, defendant must show that his attorney failed to provide reasonably effective representation. U.S.C.A.Const. Amend. 6.

2. Criminal Law 641.13(1)

Reasonably effective respresentation by counsel does not entitle defendant to error free performance but does require that counsel's conduct fall within range of competency generally demanded of attorneys in criminal cases. U.S.C.A. Const.Amend. 6.

3. Criminal Law 641.13(7)

Counsel's failure to file a brief with appeal constituted ineffective assistance of counsel, even though State rule permitted filing of appeal without filing brief and required appellate court to review record for error apparent on the record. Ala.Code 1975, § 12-22-240; Ala.Rules App.Proc., Rules 39(f), 40; U.S.C.A.Const.Amend. 6.

4. Criminal Law 641.13(7)

As an active advocate, appellate counsel is duty bound to affirmatively promote his client's position before court and such duty not only requires counsel to inform court of errors committed at trial, but additionally mandates that counsel provide legal citations and reasoning to support any claim for relief. U.S.C.A.Const. Amend. 6.

5. Criminal Law 1130(1)

Mere fact that appellate courts are obligated to review record for errors cannot be considered substitute for legal reasoning and authority typically found in brief. Ala. Code 1975, § 12-22-240;

Ala. Rules App. Proc. Rules 39(f), 40; U.S.C.A.Const.Amend. 6.

6. Criminal Law 641.13(7)

Failure to file brief in nonfrivolous appeal falls below standard of competency expected and required of counsel in criminal cases and constitutes ineffective assistance. Ala.Code 1975, § 12-22-240; Ala.Rules App.Proc., Rules 39(f), 40; U.S.C.A. Const.Amend. 6.

Appeal from the United States District Court for the Northern District of Alabama.

Before MORGAN, JOHNSON and HENDERSON, Circuit Judges.

JOHNSON, Circuit Judge:

We are again called upon to determine whether a criminal defendant received effective assistance from his attorney. Concluding that counsel's failure to file a brief with the direct appeal in state court amounted to ineffective assistance in contravention of the Sixth Amendment, we reverse and remand with instructions.

Appellant Danny Ray Mylar was convicted of first degree murder and sentenced to life imprisonment. The facts surrounding his sordid crime are adequately set forth in the appellate court's opinion and need not be repeated here. Miles v. State, 343 So.2d 801 (Ala.Crim.App.), cert. denied, 343 So.2d 806 (Ala.1977). Following the trial, Mylar sought appellate review of the con-

viction. His attorney, however, failed to file a brief with the appeal. Under Alabama law, counsel need not file a brief in order to perfect the appeal.[1] The Alabama Court of Criminal Appeals reviewed the record for error as required by statute and affirmed the conviction.[2] Mylar unsuccessfully petitioned for rehearing and a writ of certiorari. In

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1. Ala.Code § 12-22-240 requires the Alabama Court of Criminal Appeals to examine the record in every appeal for errors "apparent on the record." Alabama courts have long held that the requirement of mandatory review alleviates the need for an attorney to file a brief with the appeal. Hymes v. State, 209 Ala. 91. 95 So.2d 983 (1923); Youngblood v. City of Birmingham, 338 So.2d 526 (Ala. Crim.App. 1976); see also Kenny v. State, 51 Ala.App. 35, 282 So.2d 387, cert. denied, 291 Ala. 786,282 So.2d 392 (1973) referring to Ala.Code § 12-22-240 as a "lazy lawyer" statute).

2. Ala.Code § 12-22-240 states:

> In all cases appealable to the court of crinminal appeals, the court must consider all questions apparent on the record or reserved in the circuit court and must enter such judgment as the law demands.

both instances, his attorney filed briefs.[3]

After exhausting state remedies, Mylar sought habeas relief in federal district court. He raised a plethora of issues, including ineffective assistance of counsel. A federal magistrate meticulously reviewed the many issues and determined that most were without merit. He did conclude, however, that the failure of Mylar's attorney to file a brief with the direct appeal amounted to ineffective assistance of counsel and recommended that habeas relief be granted. The district court adopted the majority of the magistrate's report but rejected the determination that Mylar had received ineffective assistance. The lower court concluded that any harm caused by the failure to file a brief had been eliminated by the state court's examination of the record for "apparent" errors. Upon this review, we reach only the claim of ineffective assistance of counsel.

[1,2] To establish ineffective assistance, a defendant must show that his attorney failed to provide "reason-

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3. Although a brief need not be filed to perfect a direct appeal, Alabama does require that a brief be submitted with a petition for rehearing. A.R.A.P. 40; Hobbie v. State, 365 So.2d 685 (Ala.Crim.App. 1978). Similarly, the Alabama Supreme Court will not consider a petition for certiorari absent a brief. A.R.A.P. 39(f); Evans v. State, 268 Ala. 344, 105 So.2d 834 (1958).

ably effective representation." United States v. Phillips, 664 F.2d 971, 1040 (5th Cir. 1981). Reasonably effective representaiton does not entitle a defendant to an error free performance. Baty v. Balkcom, 661 F.2d 391, 394 (5th Cir. 1981). It does, however, require that counsel's conduct fall within the range of competency generally demanded of attorneys in criminal cases. McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970); accord. Beckham v. Wainwright, 639 F.2d 262, 267 (5th Cir. 1981).

[3] Few cases have elucidated the "range of competency" required of counsel on appeal. Courts have generally held that the inexcusable failure of counsel to perfect an appeal constitutes ineffective assistance. E.g., Chapman v. United States, 469 F.2d 634 (5th Cir. 1972)(after filing notice of appeal, counsel intentionally abandoned appeal without notifying defendant); Wainwright v. Simpson, 360 F.2d 307 (5th Cir. 1966) (attorney intentionally failed to file appeal without notifying defendant). On the other hand, an attorney's failure to brief meritless points of law will normally not be deemed ineffective asistance. Mendiola v. Estelle, 635 F.2d 487 (5th Cir. 1981); accord, Gustave v. United States, 627 F.2d 901 (9th Cir. 1980). The instant case, however, falls between the two extremes. Mylar received an appeal, but was denied the benefit of any adversarial brief, including argument in favor of his position. Although a troublesome issue, we glean sufficient guidance from prior decisions to conclude that the failure of this instance to file a brief with the appeal constituted

ineffective assistance of counsel.

[4] In Anders v. California, 386 U.S. 738, 744, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967), the Supreme Court made clear that appellate counsel must function as an "active advocate on behalf of his clients." Accord, Entsminger v. Iowa, 386 U.S. 748, 751, 87 S.Ct. 1402, 1403, 18 L.Ed.2d 501 (1967). As an "active advocate", appellate counsel is duty bound to affirmatively promote his client's position before the court. Such a duty not only requires counsel to inform the court of errors committed at trial, but additionally mandates that counsel provide legal citations and reasoning to support any claim for relief. Unquestionably a brief containing legal authority and analysis assists an appellate court in providing a more thorough deliberation of an appellant's case. See Anders, supra, 386 U.S. at 745, 87 S.Ct. at 1400 (a brief would "induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as funished by counsel.")

Whether the failure to file an appellate brief constitutes ineffective assistance of counsel was squarely confronted in Passmore v. Estelle, 607 F.2d 662 (5th Cir. 1979), cert. denied, 446 U.S. 937, 100 S.Ct. 2155, 64 L.Ed.2d 789 (1980). The court opined that the failure of defendant's counsel to file a brief with the direct appeal could "hardly be said to reflect the 'role of an active advocate in behalf of his clients.'" Id. at 663 n.4. Although acknowledging that the state court had

reviewed the record for "fundamental error", the court nonetheless concluded that the failure to file a brief fell below the minimum level of competency required by the Constitution. See also Robinson v. Wyrick, 635 F.2d 757, 759 (8th Cir. 1981)(filing brief that presented no errors for review constituted ineffective assistance of counsel).

The State contends that neither the holding in Passmore nor the reasoning in Anders controls the instant case. The State correctly points out that under Alabama law the Court of Criminal Appeals must examine the record in every appeal for errors "apparent on the record or reserved in the circuit court...." Ala.Code § 12-22-240. The State argues and the district court found that this statutory duty guarantees that all criminal defendants will receive a meaningful review and therefore eliminates any harm caused by the absence of an appellate brief. We find the argument unpersuasive.

[5] Admittedly, in Passmore, the state appellate court was not compelled by state law to examine the record for error. Nonetheless, the court did so. We consider it somewhat specious to suggest that Mylar received a more meaningful review than the defendant in Passmore simply because the Alabama appellate courts are compelled by law to examine the record. Moreover, if a brief contained nothing more than a list of errors, Alabama's requirement of mandatory review might well alleviate the need for an appellate brief. As previously noted, however, a brief normally contains more than a list of errors. A brief sets

forth a partisan position and contains legal reasoning and authority supporting the defendant's position. The mere fact that appellate courts are obligated to review the record for errors cannot be considered a substitute for the legal reasoning and authority typically found in a brief.[4]

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4. The State relies primarily upon Hill v. Page, 454 F.2d 679 (10th Cir. 1971), to support its position. In Hill, a divided panel concluded that the absence of an appellate brief did not constitute ineffective assistance of counsel where the appellate court reviewed the record for "fundamental error." The majority opinion is conclusory and contains no insightful analysis. We find the position articulated by the dissent more convincing. Id. at 681, 682 (Holloway, J., dissenting)(stating that failure to file appellate brief is inconsistent with counsel's duty as an "active advocate").

Further, in deciding this case, we do not write on a clean slate. In Passmore v. Estelle, supra, the former Fifth Circuit determined that the absence of a brief amounted to ineffective assistance, notwithstanding the fact that the state appellate court had actually reviewed the record for error. We find Passmore indistinguishable from the instant case in all material aspects. Having adopted the former Fifth Circuit case law as precedent, Bonner v. City of Prichard, 661 F.2d 12-6 (11th Cir. 1981)(en banc), we are not free to overrule Passmore and adopt the majority's "reasoning in Hill v. Page, supra, even if we found it persuasive.

The State further asserts that the failure to file the brief with the district court was cured when Mylar's attorney filed a brief with the petition for rehearing and certiorari. We do not agree. An appellate court conducts its most in-depth and complete review of a case during the direct appeal. A petition for rehearing typically receives a more summary consideration. Similarly, a brief filed with a petition for certiorari cannot compensate for the absence of an appellate brief. A state supreme court does not normally accept certiorari in all cases. As a result, most defendants petitioning for certiorari will not receive the same type of plenary review that occurs during the direct appeal. Accordingly, the duties of an "active advocate" mandate that appellate counsel assert his client's position at the most opportune time by filing a brief with the direct appeal.

[6] We hold that the failure to file a brief in a nonfrivolous appeal falls below the standard of compentency expected and required of counsel in criminal cases and therefore constitutes ineffective assistance.[5] We do not at

5. Independent of the constitutional issue, we question the wisdom and propriety of an attorney failing to submit an appellate brief in a capital case. Although Alabama courts have long held that counsel need not file a brief to perfect an appeal, see note 1 supra, the stakes in Mylar's case--life imprisonment--dictated that his attorney not rely exclusively upon review of the record by the appellate court to obtain reversal or a new trial. Instead, counsel should have actively advocated his client's position by filing a brief with the direct appeal.

this time set aside the conviction in this case. However, we do remand the case to the district court with instructions to grant the petition for habeas corpus unless the State of Alabama within a reasonable time grants Mylar either an out-of-time appeal or a new trial. Passmore v. Estelle, supra, 607 F.2d at 664; Hall v. Wainwright, 441 F.2d 391, 393 (5th Cir. 1971).

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 81-7412

D. C. Docket No. CA-79-A-1420-S

DANNY RAY MYLAR,
a/k/a DANNY RAY MILES,

Plaintiff-Appellant,

versus

STATE OF ALABAMA,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

Before MORGAN, JOHNSON and HENDERSON, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby reversed and remanded to the said District Court with instructions in accordance with the opinion of this Court.

April 01, 1982

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7412

U.S.Court of Appeals
Eleventh Circuit
FILED
APR 29 1982
NORMAN E. ZOLLER
Clerk

DANNY RAY MYLAR a/k/a
DANNY RAY MILES,

Plaintiff-Appellant,

versus

STATE OF ALABAMA,

Defendant-Appellee.

- - - - - - - - - - -

An appeal from the United States District Court for the Northern District of Alabama

- - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 1, 11 Cir., 1982, ___ F.2d ___).

(April 29, 1982)

Before MORGAN JOHNSON and HENDERSON,
Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson
United States Circuit Judge

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
OFFICE OF THE CLERK

May 13, 1982

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No. 81-7412
MYLAR -vs- STATE OF ALABAMA
CA-79-A-1420-S

MANDATE STAYED TO AND
INCLUDING June 12, 1982

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should not be made as a matter

of course but only when the record is deemed essential to a proper understanding of the case by that Court.

A copy of the opinion, judgment, or Rule 25 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are coies of the said documents which have been entered in this cause.

Very truly yours,

NORMAN E. ZOLLER, Clerk

By: /s/Phyllis R.Scott
Deputy Clerk

Encls.

cc: Ms. Linda B. Friedman

APPENDIX C

28 UNITED STATES CODE 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the grounds that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective pro-

cess or the existence of circumstances rendering such process ineffective to protect the right of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In an proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indi-

cia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit -

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding; (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right,

failed to appoint counsel to prepresent him in the State Court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State Court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the

record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the ckerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

APPENDIX D

343 So.2d 801

Danny Ray MILES, alias

v.

STATE.

6 Div. 222.

Court of Criminal Appeals of Alabama.

Feb. 1, 1977.

Rehearing Denied March 1, 1977.

Defendant was convicted in the Circuit Court, Jefferson County, Henry E. Pickens, J., of murder in the first degree and he appealed. The Court of Criminal Appeals, Harris, J., held that where defendant's co-felon refused to testify at defendant's trial, the trial court properly admitted into evidence the co-felon's testimony given at defendant's preliminary hearing, at which time co-felon had been subjected to an extensive, thorough and searching cross-examination by defendant's lawyers; and that where defendant and his cofelon were engaged in a common enterprise, both could be convicted of murder, regardless of which of them actually pumped the bullets into the bodies of the victims.

Affirmed.

Certiorari denied, Ala., 343 So.2d 806.

1. Criminal Law 544

In prosecution for murder in first degree in which defendant's cofelon refused to testify, trial court did not err in admitting into evidence cofelon's testimony given at defendant's preliminary hearing, at which time cofelon had been subjected to extensive, thorough and searching cross-examination by defendant's lawyers.

2. Criminal Law 1159.4(2)

It was solely within province of jury and not Court of Criminal Appeals to determine credibility of cofelons who sought to blame each other for crime.

3. Homicide 29

Where defendant and cofelon were engaged in common enterprise when two victims were killed, both could be convicted of murder in first degree, regardless of which of them actually pumped the bullets into the bodies.

No brief for appellant.

William J. Baxley, Atty. Gen. and Eugenia D. B. Hofammann, Ast. Atty. Gen., for the State, appellee.

HARRIS, Judge.

Appellant, Danny Ray Miles, AKA Danny Ray Mylar, was convicted of murder in the first degree and the jury fixed his punishment at life imprisonment in the penitentiary. Throughout the trial proceedings appellant was represented by

the widely known law firm of Wilkinson, Purvis, Pickard & Parsons of Birmingham. All of these lawyers are experienced in trial work and are noted for their resourcefulness, ingenuity and astuteness in protecting the constitutional rights of their clients.

This is one of the most bizarre cases to find its way to this Court in a long time. It involves a double murder, robbery, kidnapping and rape. The victims were Mrs. Clarice Knabe and Ronald Harvel White. Appellant was indicted for killing White with a .38 caliber pistol and one Samuel "Bud" Yarber was indicted and convicted in the shooting death of Mrs. Knabe and he, too, was sentenced to life imprisonment. This is a classical case of two murder suspects, each trying to put the blame on the other and thus exculpate himself from a murder conviction. Their efforts backfired and justice still reigns supreme.

This tragic episode began on the late afternoon of November 3, 1975, when appellant went to the apartment of Yarber around 6:30 p.m. About 45 minutes later they left in Yarber's car to go out drinking. They went to several bars and drank beer at each. Appellant asked Yarber to accompany him to K-Mart's Sporting Goods Department in order to purchase some ammunition for Yarber's .38 caliber pistol which appellant had previously asked to borrow. They went to K-Mart, where appellant purchased a box of ammunition around 9:00 p.m. that night. This purchase was recorded in a book which the manager of the Sporting Goods Department testified he was required by law to keep.

The two men then returned to Yarber's apartment where Yarber gave appellant his pistol. As appellant was loading the pistol the pistol discharged and the bullet lodged in the wall or ceiling of the living room. Yarber became provoked at appellant for discharging the pistol in his apartment for fear he would be evicted. Appellant apologized to Yarber and carried the pistol out of the apartment and put it in his car.

A short while later the two men left in appellant's car and went to the 2010 Lounge in downtown Birmingham, arriving there around 9:30 p.m. They parked in the rear parking lot and entered the lounge through the back door. There were a number of customers in the place at the time. They were all drinking and watching a football game on television. The football game was over just before 11:00 p.m. and everyone left except the bartender, Mrs. Clarice Knabe, Mr. Ronald Harvel White, appellant and Mr. Yarber. At this time, according to the testimony of Mr. Yarber given at a preliminary hearing, appellant pulled out the pistol he had borrowed from Y arber and ordered Mrs. Knabe and Mr. White to put their hands up and said, "This is a stick-up." Appellant ordered Yarber to lock the front door and then demanded all the money from Mrs. Knabe and Mr. White. Mrs. Knabe protested that the owner of the lounge did not leave any money in the place. Appellant walked behind the bar to check for himself. Appellant ordered White to empty his pockets on the counter and White put his wallet on the bar. At this time there was a knock on the front door and appellant ordered Mrs. Knabe and

Mr. White out the back door and into the back seat of his car. Appellant ordered Yarber to drive the car. Yarber asked appellant where they were going and appellant told him to drive to the place where they had zeroed Yarber's deer rifle a few weeks previously. Yarber began traveling south on I-65 toward Hoover, Alabama, and turned south on Highway 31. They traveled south on Highway 31 to Highway 150 going toward Bessemer. During the entire trip from the 2010 Lounge appellant kept asking Mrs. Knabe what she was going to tell the owner of the lounge and she said, "We're going to tell him that two colored men came in and robbed us." Appellant asked White what he was going to say and White told him he was going to say the same thing that Mrs. Knabe was going to say.

Appellant pointed the pistol at Mrs. Knabe and White in the back seat and told them to take off all their clothes. After they had completely disrobed appellant told Mrs. Knabe to get in the front seat between him and Yarber and she did. When they arrived at the appointed place appellant ordered Mrs. Knabe out of the car and told White to keep his hands up inside the car. Appellant then proceeded to have sexual intercourse with Mrs. Knabe on the trunk of the car while Yarber and White remained inside the car. He then ordered White out of the car and told Mrs. Knabe to lie on her back on the ground. Appellant ordered White to get on top of Mrs. Knabe. While they were in that position, according to sworn testimony given by Yarber at the preliminary hearing, appellant shot and killed both Mrs. Knabe and Mr. White. Appellant then reloaded the pistol, and he emptied it

again into the bodies of the two victims. Yarber saw appellant standing over the two victims with the pistol in his hand and said he did not know how many shots were fired but thought there were ten to fifteen. Appellant then got back in the car and told Yarber to return to Highway 31, and to find some deep water so that he could dispose of the gun.

As they drove along appellant directed Yarber to throw the clothes of the victims out of the car at different places and intervals along the highway. He then had Yarber drive to Lake Purdy off Highway 119 where appellant got out of the car and threw the pistol as far into the lake as he could throw it, and threw two unspent cartridges several feet out into the lake.

While in the car on the way back to town appellant pressed Yarber to take some of the money that he had obtained in the robbery of Mrs. Knabe and Mr. White. Yarber told appellant that he did not want the money but he got around fifty dollars anyway, and appellant coached Yarber as to their alibi on this fateful night.

Yarber was called as a State witness during appellant's murder trial but he refused to answer a single question posed to him by the trial court or the District Attorney. Yarber would not even state his name. The trial court ruled that it would serve no useful purpose to hold him in contempt of court and sentence him to jail. The trial court, over appellant's objection, admitted into evidence Yarber's testimony given at appellant's preliminary hearing at which time Yarber

was subjected to an extensive, vigorous, withering, thorough and searching cross-examination by appellant's lawyers.

It is noteworthy that appellant testified at his own trial and his testimony as to all the details, places, and circumstances leading up to and culminating in the robbery, kidnapping and killing of Mrs. Knabe and Mr. White, in the main, pigtracked the testimony of Yarber with one exception: Appellant claimed that Yarber was the leading actor in the entire drama and it was Yarber who did all the things that Yarber accused appellant of doing.

[1] Appellant objected to the introduction of Yarber's testimony given at the preliminary hearing on the ground that the proper predicate had not been laid for his former testimony, viz., (1) that the witness was not absent from the State permanently, (2) that he was not dead, (3) that he could not be found after diligent effort, (4) that he was not under any disability, and (5) that he was not available by reason of a claim of privilege. These were the common-law rules governing the admissibility of a witness's testimony, given under oath, at a former trial, or preliminary hearing, when the witness was cross-examined or the opportunity was afforded for cross-examination.

These rigid common-law rules have been relaxed in many states in the interest of insuring a full measure of justice. These rules have been relaxed in this state for this reason and it is now settled law. Wyatt v. State, 35 Ala.App. 147, 46 So.2d 837; Bridges v.

State, 26 Ala. App. 1, 152 So. 51.

In Bridges v. State, supra, this Court said:

> "The witness Gilpin, when called, refused to testify, claiming his constitutional right not to be forced to give evidence which would tend to incriminate him. He thereby placed himself where he was not available to the state to be used as a witness. Thereupon, over the objection and exception of defendant, the state was allowed to make preliminary proof that this witness had been examined and cross-examined as a witness for the state on the former trial of this same case in the circuit court of Jefferson county, and over objection and exception of defendant the state was then allowed to read to the jury the testimony of the witness Gilpin given on such former trial. This is not now an open question in this state, and while there are some decisions to the contrary, this court and the Supreme Court have spoken on the question and we see no reason to reopen the subject. The witness Gilpin having testified on a former trial of this case, with full opportunity for cross-examination and when called to testify on this trial he rendered himself incompetent as a witness without fault on the part of the state, the trial court properly allowed his testimony on the former trial to be read in evidence. Woodward v. State, 21 Ala.App. 417, 109 So. 119; McCoy v. State, 221 Ala. 466, 129 So. 21."

Oliver Clark was driving on Highway 150 around 7:00 a.m. on November 4, 1975 and discovered the nude bodies of the victims. He went to a telephone and called the office of the State Troopers. State Trooper Jim Wallace responded to the call. After viewing the bodies Trooper Wallace secured the scene and notified all State, County and City law enforcement agencies.

J.F. Helton, Deputy Corner of Jefferson County, came to the murder scene and pronounced the victims dead.

Jay Glass, and Assistant Pathologist, with years of experience in performing autopsies to determine the cause of death, came to the murder scene and performed autopsies on both victims. He stated that the cause of death of both the male and female was due to multiple gunshot wounds. The bodies were removed to a local morgue where more definitive autopsies were performed. He took a vaginal smear and by a microscopic examination determined evidence of spermatazoid. Mr. Glass also found numerous penetrating and perforating gunshot wounds to the head and body of both victims and he was able to remove several projectiles or slugs from each body. He further testified there were seven entrance wounds in the body of the female and nine entrance wounds in the body of the male.

Some sixteen witnesses testified for the State and we see no reason to detail the testimony given by each of them. Mrs. Alma Vest was the last person to see appellant, Yarber, Mrs. Knabe and Mr. White together at the 2010 Club on

November 3, 1975, just before 11:00 p.m. She knew Mr. White as he was her immediate supervisor at the Post Office where both of them were employed. At the time she left the 2010 Club with her companion no one was at the club except Mrs. Knabe, Mr. White, appellant and Yarber.

After these brutal killings were discovered the law enforcement officials in Jefferson County began an extensive manhunt to track down and apprehend the killers. Evidence technicians found fingerprints on glasses and beer bottles and Mrs. Knabe's purse on the night that they were missing from the club. These latent fingerprints were turned over to an expert technician whose qualifications were admitted by counsel for appellant. According to her testimony she was able to identify the latent prints left on the various items in the club with the known fingerprints of appellant and she testified that they were identical.

Other evidence technicians removed a .38 caliber bullet from the wall of the 2010 Club and from the home of Yarber. They also found spent cartridges at the scene of the double murder. A .38 caliber pistol was recovered from Lake Purdy along with two unspent .38 cartridges. The autopsy surgeon recovered three slugs from the body of Mr. White. All of these cartridges and slugs together with the .38 pistol were turned over to an expert to test-fire the pistol and make a microscopic comparison of the slugs removed from the club, from Yarber's home, and from the body of Mr. White. He testified that the microscopic comparison showed beyond doubt that each of these slugs was fired from this

particular .38 caliber pistol.

In short, the evidence adduced by the State weaved a web around appellant from which he was unable to extricate himself from his connection with this double murder.

[2] As we have pointed out the testimony of appellant and the testimony of Yarber given at the preliminary hearing were conflicting in the extreme. It was solely within the province of the jury, and not this Court, to determine the credibility of these two felons. Snipes v. State, 50 Ala.App. 139, 177 So.2d 413; Pugh v. State, 51 Ala.App.164, 283 So.2d 616; Waters v. State, 55 Ala. App. 646, 318 So.2d 342. Hall v. State, 50 Ala.App. 666, 282 So.2d 104.

In Stokley v. State, 254 Ala. 534, 49 So.2d 284, the Supreme Court held:

> "It is well established that when, by prearrangement or on the spur of the moment, two or more persons enter upon a common enterprise or adventure and a criminal offense is contemplated, then each is a conspirator, and if the purpose is carried out, each is guilty of the offense committed, whether he did any overt act or not. This rests on the principle that one who is present, encouraging, aiding, abetting, or assisting, or who is ready to aid, abet, or assist the other in the perpetration or commission of the offense, is a guilty participant, and in the eye of the law is equally guilty with the one who does the act. Such community of

purpose or conspiracy need not be proved by positive testimony. It rarely is so proved. The jury is to determine whether it exists, and the extent of it, from the conduct of the parties and all the testimony in the case. Morris v. State, 146 Ala. 66, 41 So. 274, and cases cited; Jones v. State, 174 Ala. 53, 57 So. 31; Teague v. State, 245 Ala. 339, 16 So.2d 877.

"When two or more persons enter upon an unlawful purpose, with a common intent to aid and encourage each other in anything within their common design, they are each responsible, civilly and criminally, for everything which may consequently and subsequently result from such unlawful purpose, whether specifically contemplated or not."

[3] This was a cold-blooded murder without any mitigating or extenuating circumstances. Two helpless and defenseless victims were robbed, kidnapped and shot to death. It does not matter which of the two men actually pumped the bullets into the bodies of Mrs. Knabe and Mr. White, they were both equally guilty of murder and must pay the penalty of the law.

We have carefully searched the record for errors injuriously affecting the substantial rights of appellant and have found none.

The judgment of conviction is affirmed.

AFFIRMED.

All the Judges concur.

Ex parte Danny Ray MILES, alias
Danny Ray Mylar.

SC 2410

Supreme Court of Alabama.

April 1, 1977.

Certiorari to the Court of Criminal Appeals, 343 So.2d 801.

EMBRY, Justice.

WRIT DENIED.

TORBERT, C.J. and BLOODWORTH, JONES and ALMON, JJ., concur.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for The State of Alabama and Commissioner Britton, Petitioners, do hereby certify that on this _____ day of June, 1892, I did serve the the requisite number of copies of the foregoing on the Attorney for Danny Ray Mylar, a/k/a Danny Ray Miles, Respondent, by mailing same to her, first class postage prepaid and addressed as follows:

Hon. Linda Friedman
Attorney At Law
1500 Brown-Marx Building
Birmingham, Alabama 35203

JOSEPH G.L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

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NO. 81-2240

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1981

STATE OF ALABAMA and
ROBERT G. BRITTON,
COMMISSIONER,

Petitioners,

V.

DANNY RAY MYLER a/k/a
DANNY RAY MILES,

Respondent

RESPONDENT'S
BRIEF IN OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

Linda Friedman
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Attorney for Respondent

QUESTION PRESENTED

Whether the failure to file a brief in a nonfrivolous criminal appeal falls below the standard of competency expected and required of counsel, in violation of the accused's right to effective assistance of counsel?

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STATEMENT OF THE CASE

Petitioners (hereinafter referred to jointly as "Alabama") correctly note that Respondent (hereinafter referred to as "Mylar") raised in his petition for a writ of habeas corpus numerous claims in addition to the claim of ineffective assistance of counsel on appeal, but Alabama incorrectly states that these other claims "were decided against him in the Courts below . . ." (Pet. 6). While the other issues were decided against Mylar by the United States District Court, on appeal the Eleventh Circuit Court of Appeals never reached the other issues, stating:

> Upon this review, we reach only the claim of ineffective assistance of counsel.

(App. 92).

The issues which were not reached by the Eleventh Circuit were very serious issues which Mylar had urged the Eleventh Circuit to consider because they concerned constitutional errors in his state court trial. Those issues, for example, included whether (1) admission of out-of-court statements of a key witness violated Mylar's rights under the confrontation clause of the Sixth Amendment, (2) admission of the statements violated Mylar's rights to due process of law, and (3) Mylar's counsel's failure to request on evidentiary hearing on the voluntariness of those statements, to determine reliability for purposes of the Sixth Amendment Confrontation Clause, constituted ineffective assistance of counsel. Mylar had called to the federal court's attention that the state court, in a

different proceeding, had ruled that the challenged testimony had been coerced; Mylar argued that the coercion and other factors made the testimony unreliable and its admission violated his right to confront the witness.

These very serious issues were not reached by the Eleventh Circuit apparently because the Circuit Court felt that they should be argued on the out-of-time appeal from the state court conviction which the Circuit Court ordered be held. While the Eleventh Circuit's failure to reach these other issues was disappointing to Mylar, that failure in no way suggests that the issues are frivolous. To the contrary, the Eleventh Circuit's determination that there were nonfrivolous issues to be considered on appeal from the state court conviction is implicit in its holding:

> We hold that the failure to file a brief in a nonfrivolous appeal falls below the standard of competency expected and required of counsel in criminal cases and therefore constitutes ineffective assistance.

(Appendix 97).

That Mylar had nonfrivolous issues to argue on appeal -- issues which have not yet been considered by the federal courts though raised in Mylar's petition for habeas corpus -- is significant because it contradicts Alabama's claim that Mylar could not have been prejudiced by his counsel's failure to file a brief.

STATEMENT OF FACTS

The Petition incorrectly argues that Mylar's counsel failed to file a brief on appeal from his state court conviction as a matter of strategy. This contention is pure theory and totally without support in the record. Mylar had maintained in his petition for habeas corpus that he was surprised when he learned that his counsel had not filed a brief. There is absolutely no evidence that Mylar's counsel made any deliberate tactical decision not to file a brief or that they communicated such a decision to Mylar.

SUMMARY OF THE ARGUMENT

The decision below falls squarely within the holding in Anders v. California, 386 U.S. 738 (1967). Petitioners are incorrect in suggesting that Anders is an aberration that this Court should reconcile with other precedent, as Anders is not inconsistent with any other decision of this Court.

Petitioners are also incorrect in suggesting that the decision below conflicts with decisions of other Circuits which condition habeas corpus relief upon some showing of prejudice. The Eleventh Circuit here found that an accused is in fact prejudiced when his counsel does not act as an advocate and, further, that Mylar's counsel prejudiced Mylar by not filing a brief when there were nonfrivolous issues to be argued.

ARGUMENT

I. There is No Conflict among the Decisions of the United States Supreme Court

There is no inconsistency among cases decided by this Court which requires this Court's attention, as Alabama contends. Alabama has not cited one case's holding, or even dicta in one case, which is contrary to another case's holding or dicta, because there is none.

Alabama argues that the Supreme Court "created a whole body of law on how a criminal appellant's lawyer must handle a state appeal of a state conviction" when it decided Anders v. California, 386 U.S. 738 (1967) and Entsminger v. Iowa, 386 U.S. 748 (1967) because those cases allegedly departed from the equal protection approach of prior Supreme Court cases and allegedly the state's only constitutional obligation on appeal is to assure equal protection to the accused. Alabama's argument is based upon a number of false assumptions.

First, assuming arguendo that Anders and Entsminger extended prior law by recognizing rights of an accused in addition to the right to equal protection, those cases nevertheless do not conflict with any other cases decided by this Court. Although Alabama argues that the only constitutional right applicable to a criminal appeal is the right to equal protection, Alabama cites no authority for that proposition. To our

knowledge, no Supreme Court case prior or subsequent to Anders and Entsminger has ever made such a declaration, or indeed any other declaration which could be construed as inconsistent with those cases.

Second, Anders and Entsminger in fact discuss the issues presented in terms of equal protection, as well as the Sixth Amendment. In Anders, where the accused was denied the assistance of a court-appointed counsel on appeal, this Court stated:

> The constitutional requirement of substantial equality and fair process can only be obtained where counsel acts in the role of an active advocate.... [I]f [the Court] finds any of the legal points arguable on their merits ... it must, prior to decision afford the indigent the assistance of counsel to argue the appeal.
>
> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

386 Id. at 744 (emphasis added). While this Court also referred to the Sixth Amendment, it explained that the Sixth Amendment requires the states to assure equal treatment to indigents:

> In Gideon v. Wainwright, 372 U.S. 335 ... (1963), the Sixth Amendment ... was made obligatory on the States by the Fourteenth Amendment, the Court holding that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him." ... We continue to adhere to these principles.

Third, Alabama misstates the issue when it claims that its only obligation is to assure equal protection in criminal appeals. The issue, rather, is whether the accused has been deprived of his right to the assistance of counsel. Apparently Alabama believes that the constitutional rights of an indigent accused are automatically satisfied as long as an attorney has been appointed to represent him, because the state has given to him the same access to counsel which the non-indigent accused has. Yet, if the appointed attorney does nothing to assist the accused, it could hardly be said that the accused received the "asistance of counsel" as guaranteed by the Sixth Amendment. The State complains that it cannot force an attorney to provide assistance and that its duty is met when it appoints the attorney. If the State's argument were accepted, and if the mere appointment of counsel were held to satisfy an accused's Sixth Amendment rights, then the State could be free to make a mockery of those rights by merely appointing attorneys and by proceeding with the case, including trial, even when the appointed attorneys fail to appear to represent the accused. The Sixth Amendment means nothing if it does not mean that an accused is entitled to counsel's actual assistance, in the role of an advocate.

The State's argument (that it has satisfied its duty by simply appointing counsel and that habeas corpus relief should not be granted when appointed counsel fails to provide assistance since that failure is beyond the State's control) is basically the same argument which this Court rejected in Cuyler v. Sullivan, 446 U.S. 335 (1980). In Cuyler, this Court held that "the Sixth Amendment right to counsel does more than require the States to

appoint counsel for indigent defendants. The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance . . . [T]he State's conduct of a criminal trial itself implicate the State in the defendant's conviction . . ." Id. at 344.

Thus, according to Cuyler, the State's duty under the Sixth Amendment prevents it from conducting a criminal proceeding when the defendant's counsel (whether retained or court-appointed) does not provide adequate legal assistance. That duty extends to appeals where the right to the effective assistance of counsel has been recognized.

Mr. Mylar never received the assistance of counsel on appeal, a right recognized squarely by this Court. There is no need, as Alabama claims, for this Court "to clarify the holdings in Anders and Entsminger so as to make them consistent with both prior and subsequent opinions" (Pet. 21). To the contrary, Anders and Entsminger are very clear and quite consistent with other decisions rendered by this Court. Moreover, the decision by the Eleventh Circuit in this case is squarely supported by Anders.

II. The Decision Below Did Not Conflict With Anders or Any Other Decision of this Court.

Alabama's second argument is that Anders and Entsminger

merely require that an indigent appellant be provided with an advocate, that Mylar was provided with an advocate and that, accordingly, the decision below was incorrectly decided. (Pet. 21-27, 37-42). The argument is wrong because Mylar's counsel did not act as an advocate.

Alabama boldly asserts that Mylar's counsel failed to file a brief on appeal as a matter of strategy and this Court refused to grant federal habeas corpus relief from strategy decisions of counsel (Pet. 41). Apart from the fact that the record does not support Alabama's argument that counsel made a deliberate tactical decision in not filing a brief, the case Alabama cites, Estelle v. Williams, 425 U.S. 501 (1976) does not support its argument. Estelle did not sanction "strategy" decisions of counsel which otherwise constitute ineffective assistance of counsel, and in fact had nothing to do with the right to counsel. Rather, in Estelle the Court merely refused to accept the petitioner's claim that he was compelled to stand trial in prison garb when his counsel made no objection at trial. The constitutional right at issue in Estelle was a prisoner's right not to be compelled to stand trial in prison garb, whereas here, the issue is the accused's right to assistance of counsel on appeal. It would be ludicrous to condition federal habeas corpus relief, where the right to counsel is the basis for relief, upon the counsel's failure to object to his own ineffectiveness. The holding in Estelle has no application here.

The issue is not whether the failure to file a brief was a strategy decision, but rather it is whether the failure -- deliberate or not --

was outside the "range of competency" required of counsel on appeal. The right to counsel is the right to effective assistance of counsel, and that right is violated when counsel's actions, including strategy decisions, are incompetent. See McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970).

The Eleventh Circuit simply held that "the failure to file a brief in a nonfrivolous appeal falls below the standard of competency expected and required of counsel in criminal cases and therefore constitutes ineffective assistance" (Appendix 97). Where there are nonfrivolous issues to be considered, an accused is entitled, as a constitutional minimum, to counsel's assistance in calling those issues to the appellate court's attention, and in arguing those issues as an advocate. Anders, supra. Mylar had serious issues to raise on appeal -- issues concerning, inter alia, the admission of a key witness' testimony from a different proceeding without the necessary showing of the witness' unavailability and of his testimony's reliability.

In conclusion, we know of no decision of this Court which has held that a state court conviction cannot be challenged on the basis of ineffective assistance of counsel where the counsel's ineffectiveness was the result of a deliberate (though incompetent) decision. Thus, the decision below is not contrary to any decisions of this Court and is, rather, entirely consistent with Anders.

III. There is No Conflict Among the Circuits.

Alabama argues that the Eleventh Circuit decision here conflicts with decisions of other circuits which have required some showing of prejudice as a condition for granting habeas corpus relief. There is no conflict because the decision below was limited to nonfrivolous appeals (Appendix 88). Mylar's state court conviction, based upon out-of-court testimony which had been ruled involuntary in another proceeding and which Mylar claims was unreliable, in fact gave rise to nonfrivolous issues regarding the admissibility of that testimony.

Since Mylar was deprived of counsel's assistance in arguing these issues to the state appellate court, he was deprived of the advocacy required by Anders:

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client .... His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses. . . .
>
> . . . .This requirement . . . would . . . induce the court to pursue all the more vigorously its own review because of the references not only to the record, but also to the legal authorities as furnished it by counsel.

Anders, supra, 386 U.S. at 744-45.

According to Anders, if Mylar's counsel in fact believed the appeal to be "wholly frivolous," he was obligated to advise the court and to file a brief on any nonfrivolous issues. Mylar's counsel did not take that action and there is no indication that he considered the appeal frivolous. Mylar in fact had issues to be argued on appeal which were not frivolous, as recognized by the Eleventh Circuit.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Linda Friedman

Linda Friedman

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

CERTIFICATE OF SERVICE

I, Linda Friedman, a member of the Bar of the Supreme Court of the United States and attorney for Respondent, do hereby certify that on the 7th day of July, 1982 I did serve one copy of the foregoing brief on

the attorney for Petitioner by mailing same, first class postage prepaid and addressed as follows:

Hon. Joseph G. L. Marston, III,
Assistant Attorney General
Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

Linda Friedman

Linda Friedman

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No. 81-2240

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1981

STATE OF ALABAMA AND
ROBERT G. BRITTON, COMMISSIONER

Petitioners,

v.

DANNY RAY MYLAR, A/K/A
DANNY RAY MILES,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, Danny Ray Mylar, a/k/a Danny Ray Miles, moves for leave to proceed in forma pauperis, and specifically requests that he be permitted to file a brief in opposition to the Petition for Writ of Certiorari, as well as any brief on the merits if Certiorari be granted, in typewritten form pursuant to Supreme Court Rule 39, and that only one copy of each brief be required to be filed and one copy served on opposing counsel. In support of this motion, Respondent states:

1. He is financially unable to afford the cost of printing briefs or of duplicating multiple copies of the brief, and is also unable to retain counsel.

2. He is incarcerated, unemployed, and without funds to pay legal fees or expenses.

3. His motion to proceed in forma pauperis had been granted by the United States District Court and the Court of Appeals had appointed the undersigned counsel, under the Criminal Justice Act of 1964, to represent him in this matter. A copy of the appointment is attached hereto.

Respectfully submitted,

Linda Friedman
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 1982, one copy of the foregoing motion was deposited in the U. S. mail, first-class postage prepaid, addressed to counsel for Petitioner, as follows: Joseph G. L. Marston, III, Assistant Attorney General, Office of the Attorney General, 250 Administrative Bldg., 64 North Union Street, Montgomery, Alabama 36130. I further certify that all copies required to be served have been served.

Linda Friedman

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205)252-4500

CJA 20 Appointment & Voucher for Counseling Services

APPOINTMENT

IN UNITED STATES ☐ MAGISTRATE ☐ DISTRICT ☒ APPEALS COURT or ☐ OTHER PANEL (Specify below)

IN THE CASE OF: DANNY RAY MYLAR, a/k/a DANNY RAY MILES

FOR: FIFTH CIRCUIT COURT OF APPEALS

BY: ATLANTA, GEORGIA

ROBERT G. BRITTON, etc., et al

LOCATION NUMBER:

PROCEEDING (Describe briefly): appeal

CHARGE/OFFENSE (Describe if applicable & check box →) ☐ Felony ☐ Misdemeanor

U.S. or other code citation ▶

1 ☒ Defendant – Adult
2 ☐ Defendant – Juvenile
3 ☐ Appellant
4 ☐ Probation Violator
5 ☐ Parole Violator
6 ☒ Habeas Petitioner
7 ☐ 2255 Petitioner
8 ☐ Material Witness
9 ☐ Other (Specify Below)

DOCKET NUMBERS
Magistrate:
District Court: CV79-A-1420-S
Court of Appeals: 81-7412

VOUCHER NUMBER: 627766

PERSON REPRESENTED (Show full name & status, & check box →)

Danny Ray Mylar

Name already appears as ☒ 1 or as ☐ 9 above

COURT ORDER

☒ APPOINTING COUNSEL
☐ RATIFYING PRIOR SERVICE
☐ EXTENDING APPOINTMENT FOR APPEAL
☐ SUBSTITUTING COUNSEL FOR:
(name of prior counsel) (date appt'd)

Because the above named "person represented" has testified under oath or has otherwise satisfied this court that he or she: (1) is financially unable to employ counsel, and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney or organization printed here and below

LINDA B. FRIEDMAN

is hereby appointed to represent this person in the above designated case.

If appointment is made by a magistrate and the case subsequently proceeds to U.S. District Court, the appointment shall remain in effect until terminated or a substitute attorney is appointed.

The attorney or organization herein appointed is authorized to claim reimbursement on this form, subject to applicable law, administrative regulations, and the plan of the court.

Signature of U.S. Judge or magistrate

Date

OR BY ORDER OF THE COURT
Linda G. Britt (Name of Deputy) 5-27-81

	CLAIMED		MATH/TECH ADJUSTED
I. COURT			
A. ARRAIGNMENT & OR PLEA			
B. MOTIONS & REQUESTS			
C. BAIL HEARINGS			
D. SENTENCE HEARINGS			
E. TRIAL			
F. REVOCATION HEARINGS			
G. APPEALS COURT			
H. OTHER (Specify below)			
TOTAL "IN COURT" HOURS		▶ $	
II. OUT OF COURT			
A. INTERVIEWS & CONFERENCES			
B. OBTAINING & REVIEWING RECORDS			
C. LEGAL RESEARCH & BRIEF WRITING			
D. INVESTIGATIVE & OTHER WORK (Specify)			
E. TRAVEL TIME (during normal office hours only): (1) TO & FROM COURT (round-trips under 1 hr not allowed) (2) OTHER TRAVEL TIME (Specify)			
TOTAL "OUT OF COURT" HOURS		▶ $	
TOTAL COMPENSATION FOR "IN COURT & OUT OF COURT" TIME		▶ ▶ $	

III. ITEMIZED EXPENSES (Specify, per instruction sheet)

	AMT. PER ITEM
	$
TOTAL ITEMIZED EXPENSES	▶ $
TOTAL COMPENSATION & EXPENSES	▶ ▶ $
DEDUCT AMOUNTS PREVIOUSLY PAID IF APPLICABLE	
NET AMOUNT CLAIMED	▶ ▶ ▶ $

If more space is needed use additional blank sheets

CERTIFICATIONS OF ATTORNEY/PAYEE

Has compensation and/or reimbursement for work in this case been previously applied for or received? ☐ Yes ☐ No
If "Yes", how much were you paid? $
By whom were you paid?

If this is an appeal did you represent person in lower court ☐ Yes ☐ No

SIGNATURE OF ATTORNEY/PAYEE — I SWEAR & AFFIRM THE TRUTH & CORRECTNESS OF ABOVE STATEMENTS — DATE

AMOUNT CERTIFIED/APPROVED: $

APPROVED FOR PAYMENT
SIGNATURE OF JUDGE/MAGISTRATE — DATE
SIGNATURE OF CHIEF JUDGE COURT OF APPEALS — Payment in excess of statutory limitation approved under 18 USC 3006A(d)(3) — DATE — AMT. APPROVED $

COUNSEL ☒ IS A PRIVATE ATTORNEY ☐ IS FURNISHED BY: ☐ COMMUNITY DEFENDER ORGANIZATION ☐ BAR ASSOCIATION OR LEGAL AID AGENCY

PHONE NO. (205) 252-4500

SOCIAL SECURITY NO. 264-48-4703

VOUCHER NUMBER ▶ 627766

HAS DEFENDANT PAID ANY MONEY TO YOU SINCE HIS ARREST, OR TO YOUR KNOWLEDGE, TO ANYONE ELSE, IN CONNECTION WITH THE OFFENSE FOR WHICH YOU WERE APPOINTED TO DEFEND HIM? IF SO, GIVE DETAILS.

ATTORNEY
ORGANIZATION
ADDRESS

Ms. Linda B. Friedman
1500 Brown Marx Building
Birmingham, AL

ZIP CODE 35203

AT TIME OF APPOINTMENT PLEASE TYPE OR PRINT CLEARLY THE NAME OF ATTORNEY OR ORGANIZATION (PAYEE) AND THE ADDRESS TO WHICH CHECK SHOULD BE MAILED

Office - Supreme Court, U.S.
FILED
JUL 23 1982
ALEXANDER L. STEVAS
CLERK

NO. 81-2240

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1981

STATE OF ALABAMA AND
ROBERT G. BRITTON, COMMISSIONER

Petitioners,

V.

DANNY RAY MYLAR, A/K/A
DANNY RAY MILES,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF AND ARGUMENT OF PETITIONERS

CHARLES A. GRADDICK
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AND

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ATTORNEYS FOR PETITIONERS

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REPLY ARGUMENT

I.

CONFLICTS REAL OR APPARENT

The Respondent asserts that there is no conflict between Anders v. California, (386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 [1967]) and Entsminger v. Iowa, (386 U.S. 748, 10 L. Ed. 2d 501, 87 S. Ct. 1402 [1967]) and the other cases on the Constitution and appeal. E.g. McKane v. Durston, 153 U.S. 684, 38 L. Ed. 867, 14 S. Ct. 913 (1894); Griffin v. Illinois, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1956); Brown v. Ohio, 360 U.S. 252, 3 L. Ed. 2d 1209, 79 S. Ct. 1164 (1959); Lane v. Brown, 372 U.S. 477, 9 L. Ed. 2d 892, 83 S. Ct. 768 (1963), and Draper v. Washington, 372 U.S. 487, 9 L. Ed. 2d 899, 83 S. Ct. 774 (1963). Ross v. Moffit, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974); Estelle v. Dorrough, 420 U.S. 534, 43 L. Ed. 2d 377,

95 S. Ct. 1173 (1974); Wainwright v. Torna, ____ U.S. ____, ____ L. Ed. 2d ____, ____ S. Ct. ____, 50 U.S. L. Wk. 3759 (1982) However, Counsel makes no effort to explain how the cases which are, "Concerned with the Constitutional requirements binding on a State in the administration of its appellate criminal procedures...." (Entsminger, 386 U.S. 748, 749, 18 L. Ed. 2d 501, 502) can be consistant with cases holding that the "...question is more profitably considered under an equal protection analysis...." (Ross, 417 U.S. 600, 611, 41 L. Ed. 2d 341, 351) In fact, the Respondent does not even cite any of the equal protection cases.

The fact, is that the Petition does not claim that there is necessarily a conflict between these two lines of cases, only that there is an apparent conflict. See the Petition, page 12. It

is also a fact that the Petition argues for the possible reconciliation of the two lines of cases, by reading Anders and Entsminger as requiring the States under the Equal Protection Clause to provide indigents with advocates rather than amicus curiae. On the apparent conflict the Petition argues:

> "...The apparent conflict arises when these cases "Anders and Entsminger] are read, not merely as requiring that the lawyer be an advocate but as requiring that he advocate in a certain sort of way...."
> (Petition pages 22-23)

There is an obvious distinction between saying something and saying nothing. A trial defense lawyer who told a Jury in open Court, "My client is guilty and deserves the maximum sentence," would be ineffective by any standards, even if the lawyer really believed that his client was guilty. However, every judicial day in this

country defense attorneys rest without presenting a defense, because there is no defense, and no one suggests that this is ineffectiveness. Carrying the same analogy to the appellate level, a similar distinction can be made between the lawyer who files a brief telling the appellate court that his client's appeal has no merit (see Anders, supra) and the lawyer who, finding nothing to brief, files nothing at all. The instant case presents a third situation: The filing of a brief is optional under the applicable rules, briefs are commonly not filed, and the lawyer, for whatever reason, files none.

II.

THE CASES RELATING TO COUNSEL AT TRIAL ARE NOT IN POINT

The Respondent relies heavily on Gideon v. Wainwright, (372 U.S 335, 9 L. Ed. 2d 799, 83 S. Ct. 792, 93 A.L.R. 2d 733 [1967]); McMann v. Richardson, (397 U.S. 759, 25 L. Ed. 2d 763, 90 S. Ct. 1441 [1970]) and Cuyler v. Sullivan, (446 U.S. 335, 64 L. Ed. 2d 333, 100 S. Ct. 1708 [1980]). These cases all have one thing in common with each other and not with the instant case - they all involved trial rather than appellate counsel. The distinction between the right to counsel at trial and on appeal, which may have been somewhat obscured by Anders and Entsminger and which was obviously ignored by the Eleventh Circuit in the instant case, has been clearly recognized by this Honorable Court at least since 1974, when this Court issued Ross v.

Moffitt, (417 U.S. 60, 41 L. Ed. 2d 341, 94 S. Ct. 243 [1974]). In that case this Honorable Court wrote:

> "...By contrast, [with trial], it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being haled into court by the State and stripped of his presumption of innocence, but rather as a a sword to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. McKane v.Durston, 153 U.S. 684, 38 L. Ed. 867 , 14 S. Ct. 913 (1894). The fact that an appeal has been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way. Douglas v. California, supra; Unfairness results only if indigents are singled out by the State and

> denied meaningful access to the appellate system because of their poverty...." (417 U.S. 600, 610-611, 41 L. Ed. 2d 341, 351) (Emphasis supplied)

In failing to make this vital distinction so clearly defined by this Honorable Court, the Eleventh Circuit ruled in patant conflict with the controlling decisions of this Honorable Court.

Applying the principles of Ross to this case, it simply can not be escaped that Mylar was not singled out nor was he denied meaningfull access to the appellate system. Mylar's lawyer, like every lawyer in Alabama criminal appeals, had the option of filing a brief or resting on the record. The Court of Criminal Appeals searched the record in Mylar's appeal for error as in every case, whether indigent or non-indigent, briefed or unbriefed. The inescapable fact is that Mylar's U.S. Constitutional rights to fairness and equal treatment were fully protected.

III.

CONFLICTS BETWEEN THE CIRCUITS

The Respondent asserts that there is no conflict between the Eleventh Circuit holding in this case and those of other circuits. This is a facinating argument, since the Eleventh Circuit itself acknowledged at least one conflict. See Mylar v. Alabama (11th Cir. 1982) 671 F. 2d 1299, 1302 footnote 4, Appendix to the Petition, page 96.

IV.

CALLING MYLAR'S APPELLATE COUNSEL "INCOMPETENT" BEGS TWO QUESTIONS

The Respondent bases his argument largely on the assumption that the failure of Mylar's appellate attorney to file a brief on original submission constituted incompetence. This argument begs not one but two questions: First, did the lawyer's omission constitute

incompetence, and second, and, more importantly, who decides the measure of competence of lawyers in state court appeals - the State Courts or the Federal Courts? This brings us right back to the fundamental issue in this case: Are appeal rights due process or equal protection in nature? If they are due process in nature, then it is not enough that the lawyer be an advocate; his advocacy must meet certain as yet undefined[1] standards. If these rights are equal protection in nature, then effective assistance of counsel on appeal

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[1] For example, if a lawyer must file a brief, must he also argue every issue or every adverse ruling? If there are five possible reversible errors in a case, and the lawyer does not argue three in order to concentrate his efforts and the Court's attention on the two he does argue, is he ineffective? On the other hand, is a lawyer ineffective if he argues twenty-five different issues, with the result that the Court overlooks his strongest issue? Must a lawyer ask for oral argument? If he does, must he argue every issue?

is a question of State law, so long as that law applies equally to all appellants.

CONCLUSION

In conclusion the Petitioners again respectfully submit that this case presents an apparent conflict in the opinions of this Honorable Court in various cases, the decision of the Court of Appeals conflicts with those of this Honorable Court and those of other circuits. For these reasons the Petitioners again pray that this Honorable Court will issue the writ of certiorari and review the decision and

opinion of the Honorable Court of Appeals and on such review will reverse the decision of said Court.

Respectfully submitted

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COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama and Commissioner Britton, Petitioners, do hereby certify that on this _____day of July, 1982, I did serve the requisite number of copies of the foregoing on the Attorney for Danny Ray Mylar, Respondent, by mailing same to her, first class postage prepaid and addressed as follows:

Hon. Linda Friedman
Attorney at Law
1500 Brown-Marx Building
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_____
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